11687

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~1884~~. 843

JOSEPH REYNOLDS AND JOHN D. MORRISEY,
PLAINTIFFS IN ERROR,

vs.

THE IRON SILVER MINING COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED APRIL 16, 1885.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 1304.

JOSEPH REYNOLDS AND JOHN D. MORRISEY,
PLAINTIFFS IN ERROR,

vs.

THE IRON SILVER MINING COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

INDEX.

	Original.	Print.
Caption	1	1
Complaint	1	1
Summons	9	4
Marshal's return	11	5
Answer	12	5
Replication	17	8
Trial commenced	22	10
Plaintiff dismisses as to damages	24	11
Order of dismissal as to damages	24	11
Order granting leave to amend complaint	24	11
Verdict	25	11
Amended complaint	25	11
Order overruling motion for new trial, &c.	32	14
Judgment	33	15
Bond	45	19
Writ of error	48	21
Return to writ of error	49	21
Citation	51	22
Proof of service of citation	52	22

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
Bill of exceptions	53	23
Plaintiffs' case	54	23
Testimony of —— Freeland	54	23
Land Patent to Wells & Moyer, March 11, 1879	66	28
Defendants' case	82	34
Testimony of W. B. Page	82	34
Exhibit A—Map	102	43
B— "	103	43
C— "	104	43
D— "	105	43
Testimony of F. G. Bulkley	106	43
Arthur Chanute	121	50
David G Miller	129	53
John Evans	130	54
—— Deuter	137	57
Albert E. Chandler	141	58
C. C. Baldwin	144	60
Chas. A. York	153	63
J. R. Looker	154	64
Leon Hardy	158	66
Charles G. Arnold	165	69
Plaintiff's case in rebuttal	171	71
Testimony of —— Whyte	171	71
—— Robinson	172	72
Defendants' requests	173	72
Instructions to jury	176	73
Motion for new trial	178	74
Certificate to bill of exceptions	181	75
Assignment of errors	182	76
Clerk's certificate	188	78

1 Pleas in the circuit court of the United States for the district of Colorado, sitting at Denver.

Be it remembered that heretofore, on, to wit, the 7th day of May, A. D. 1884, came the Iron Silver Mining Company, by G. & Symes, Esq., its attorney, and filed in said court its complaint, and sued out of said court a writ of summons against Joseph Reynolds and J. D. Morrissey, and the said complaint is in words and figures as follows, to wit:

Complaint.

In the Circuit Court of the United States for the District of Colorado, in the Eighth Circuit.

THE IRON SILVER MINING COMPANY, Plaintiff,
vs.
JOSEPH REYNOLDS and J. D. MORRISSEY, Defendants.

The Iron Silver Mining Company, a corporation created and organized under the laws of the State of New York, and a citizen of the said State of New York, complains of Joseph Reynolds, who is a citizen of the State of Illinois, and J. D. Morrissey, who is
2 a citizen of the State of Colorado, and for cause of action alleges:

1st. That on the 1st day of January, A. D. 1884, the said plaintiff company was, and long before had been and now is, the owner, and seized and possessed of that certain tract of land and mining claim situated in California Mining District, county of Lake, and State of Colorado, consisting of one hundred and nine-three and forty-three one-hundredths (193 $\frac{43}{100}$) acres of land, more or less, and particularly described by metes and bounds in the United States patent issued therefor, as follows, with magnetic variation fifteen (15) degrees east, to wit:

Beginning at cor. No. 1, a porphyry rock 5x6x9 in. in size, marked 1—281, from which U. S. locating monument No. 1 bears N. 73° 1′ 36″ W. at 10,870 and $\frac{63}{100}$ ft., and the peak of Bald Mt. bears S. 65° 35′ E.; thence from cor. No. 1 S. 79° 28′ E. 590.5 ft. to cor. No. 2, a porphyry rock 5x7x12 in. in size, marked 2—281; thence S. 58° 8′ E. 436 ft. to road, 721 ft. to cor. No. 3, a granite rock 5x7x13 in. in size, marked 3—281; thence S. 25° 4′ W. 68 ft. to cor. No. 4, a granite rock 7x8x8 in. in size, marked 4—281; thence S. 66° 8′ E. 733 ft. to cor. No. 5, a granite rock 7x11x13 in. in size, marked 5—281; thence S. 29° 48′ W. 20 ft. to N. bank of California Gulch,
3 66 ft. to stream, 90 ft. to S. bank of California Gulch, 133 ft. to cor. No. 6, a quartz rock 8x11x12 in. in size, marked 6—281; thence N. 72° 50′ W. 250 ft. to cor. No. 7, a quartz rock 6x8x12 in. in size, marked 7—281; thence S. 20° 48′ W. 240 ft. to N. bank of Eureka Gulch, 550 ft. to S. bank of said gulch, 845 ft. to cor. No. 8, a porphyry rock 7x9x12 in. in size, marked 8—281; thence S. 72° 8′ W. 200 ft. to cor. No. 9, a porphyry rock 5x7x10 in. in size, marked 9—281; thence S. 400 ft. to cor. No. 10, a quartz rock 5x6x10 in. in

size, marked 10—281, from which a blazed pine tree 13 in. in diameter bears N. 32° 10′ E. 8.3 ft., and a pine 14 in. in diameter, blazed, and marked 10—281, bears S. 71° 38′ E. — ft.; thence from cor. No. 10 S. 39° 56′ W. 750 ft. to cor. No. 11, a quartz rock 4x8x11 in. in size, marked 11—281, from whence a pine tree 16 in. in diameter, blazed, and marked 11—281, bears N. 62° 12′ E. 12 ft., & a pine tree 9 in. in diameter, blazed, and marked 11—281, bears S. 15° 21′ E., 8.10 ft.; thence from said cor. No. 11 W. 128.71 ft. to cor. No. 12, a granite rock 5x7x11 in. in size, marked 12—281, from which a pine tree 13 in. in diameter, blazed, & marked 12—281, bears S. 5° 13′ E. 16.2 ft., and a pine tree 11 in. in diameter, blazed, and marked 12—281, bears S. 59° 8′ W. 14.8 ft.; thence from cor. No. 12 S. 11,004.1 ft. to cor. No. 13, a granite rock 5x11x14 in. in size, from which Mt. 4 Sheridan bears S. 73° 36′ E., monument on Mt. Elbert bears S. 54° 46′ W., a pine tree 9 in. in diameter, blazed, and marked 13—281, bears S. 24° 8′ W. 10.5 ft., and a pine tree 5 in. in diameter, blazed, and marked ——, bears N. 77° 47′ W. 13 ft.; thence from cor. No. 13 W. 3,590.16 ft. to cor. No. 14, a granite rock 5x10x14 in. in size, marked 14—281, from which a pine tree 11 in. in diameter, blazed, & marked 14—281, bears N. 29° 32′ E. 11.2 ft., & a blazed pine tree 12 in. in diameter, marked 14—281, bears N. 71° 25′ W. 31 ft.; thence from cor. 14 26′ W. 1,138.69 to cor. No. 15, a quartz rock 5x7x9 in. in size, marked 15—281, from which a blazed pine tree 17 in. in diameter bears N. 65° 15′ W. at 11.01 ft., a double pine tree, blazed, & marked 15—281, bears S. 19° 10′ E. 10 ft.; thence from cor. No. 15 E. 590 ft. to cor. No. 16, a porphyry rock 7x8x11 in. in size, marked 16—281, the same being cor. No. 3 of sur. No. 336; thence N. 65° 15′ E. along the southerly boundary of said sur. 236,527 ft. to cor. No. 17, a porphyry rock 5x12x12 in. in size, marked 17—281, the same being cor. No. 1 of sur. No. 259; thence S. 50° E. 472.42 ft. to cor. No. 18, a granite rock 3x8x14 in. in size, marked 18—281, the same being cor. No. 2 of said sur. No. 259; thence N. 65° E. 531.29 ft. to cor. No. 19, a granite rock 5x5x15 in. in size, marked 19—281; thence S. 190 ft. along the western boundary of the Oro La Plata lode to cor. No. 20, a granite rock 6x6x18 in. in size, marked 20—281, 5 from which a blazed pine tree 7 in. in diameter bears N. 19° 30′ E. 5.5 ft., & a blazed pine tree 12 in. in diameter bears S. 80° 30′ W. 19 ft.; thence from cor. No. 20 E. along the S. boundary of said Oro La Plata lode 30 ft. to cor. No. 21, a granite rock 6x7x— in. in size, marked 21—281, from which a blazed pine tree 14 in. in diameter bears N. 72° 6′ E. 21.1 ft., and a blazed pine tree 6 in. in diameter bears N. 35° 33′ E. 12.8 ft.; thence from cor. No. 21 N. along the E. boundary of said Oro La Plata lode 399.89 ft. to cor. 22, a quartz rock 6x6x9 in. in size, marked 22—281; thence N. 65° E. 152.7 ft. to cor. 23, a lime rock, marked 23—281, the same being cor. No. 3 of sur. No. 259, from which a blazed pine tree 14 in. in diameter bears S. 72° 4′ E. 11.8 ft., & a blazed pine tree 10 in. in diameter bears N. 16° 30′ E. 26 ft.; thence from cor. No. 23 S. 50° E. 8.66 ft. to cor. No. 24, a granite rock, marked 24—281, the same being cor. No. 4 of sur. No. 259, from which a blazed pine tree 13 in. in diameter bears N. 1° 12′ E. 30.7 ft.; thence from cor. No. 24 N. 65°

15′ E. 300 ft. to. cor. No. 25, a granite rock, marked 25—281, the same being No. 25 of sur. No. 259, from which a blazed pine tree 18 in. in diameter bears N. 89° 20′ W. 12.5 ft., and a blazed pine tree 15 in. in diameter bears S. 4 ft.; thence from cor. No. 25 50° W. 310 ft. to cor. No. 26, a granite rock 5x9x12 in. in size, marked
6 26—281, the same being cor. No. 26 of sur. No. 259, from which a blazed pine tree 16 in. in diameter bears S. 10° 31′ W. 33 ft., & a blazed pine tree 13 in. in diameter bears S. 45° 42′ W. 15.2 ft.; thence from cor. No. 26 S. 65° W. 198.52 ft. to cor. No. 27, a granite rock 7x9x11 in. in size, marked 27—281, from which a blazed pine tree 14 in. in diameter bears N. 19° 50′ E. 6 ft., a blazed pine tree 12 in. in diameter bears N. 72° 24′ W. at 27.5 ft.; thence from cor. No. 27 N. 40° 9.89 ft. to cor. No. 28, a porphyry rock 6x8x16 in. in size, marked 28—281, the same being cor. No. 3 of sur. No. 278, from which a blazed pine tree 14 in. in diameter bears N. 13° 46′ W. 29.8 ft., and a blazed pine tree 16 in. in diameter bears S. 58° 27′ E. 18 ft.; thence from cor. No. 28 S. 40° E. 150 to cor. No. 29, the same being cor. No. 4 of sur. No. 278, from which a blazed pine tree 16 in. in diameter bears S. 71° 32′ W. 19.3 ft., and a blazed pine tree 16 in. in diameter bears N. 22° 25′ E. 5.7 ft.; thence from cor. No. 29 N. 466.5 ft. to cor. No. 30, a porphyry rock 4x8x14 in. in size, marked 30—231, the same being cor. No. 5 of sur. No. 278, from which a pine tree 20 in. in diameter bears N. 87° 25′ W. 17.17 ft., and a blazed pine tree 12 in. in diameter bears N. 50° 10′ E. 29 feet; thence from cor. No. 30 N. 40° W. 852.65 ft. to cor. No. 31, a
7 porphyry rock 6x8x12 in. in size, marked 31—281, from which a blazed pine tree bears N. 57° 31′ E. 17 ft., and a blazed pine tree 14 in. in diameter bears N. 42° 16′ W. 12.9 ft.; thence from cor. No. 31 N. 18° W. 722.25 ft. to cor. No. 32, a porphyry rock 7x 8x15 in. in size, marked 32—281; thence N. 46° E. 822 ft. to cor. No. 33, a porphyry rock 3x6x18 in. in size, marked 33—281; thence E. 189.29 ft. to cor. No. 34, a porphyry rock 3x4x8 in. in size, marked 34—381, from which a blazed pine tree 18 in. in diameter bears N. 33° 30′ E. 4 ft.; thence from cor. No. 34 N. 324.95 ft. to S. bank of California Gulch, 374.95 ft., to stream in said gulch, 409.95 ft., to N. bank of said gulch, 464.95 ft., to county road, 474.95 ft., to the place of beginning, containing 193.43 acres of land, more or less.

2. That the said plaintiff company claims an estate of inheritance, in fee-simple, in and to said premises.

3rd. That the said plaintiff company is now, and was at the times above and hereafter mentioned, entitled to the immediate and exclusive possession of the above-described land and premises.

4th. That while the said plaintiff Co. was so the owner of and seized and possessed and entitled to the possession of the said land and premises the said defendants afterwards, and on, to wit, the
8 1st day of May, 1884, entered upon a portion of said mining land and premises, to wit, the northwest portion of the said above-described premises, at and near the north and east line of said premises, and then and there took possession of that portion of said mining land and premises, and wrongfully and unlawfully ousted the plaintiff company therefrom, and from thence hitherto have

unlawfully and wrongfully retained and withheld and still do wrongfully and unlawfully retain the same and the possession thereof from the said plaintiff Co.; that the value of that portion of the said mining land and premises from which said plaintiff company has been so ousted by the said defendants, and which they still unlawfully detain from the plaintiff company, is over fifty thousand dollars ($50,000), and the rents, issues, and profits thereof while the defendants have so taken and held possession of the same, and the damage of such detention, is ten thousand (10,000) dollars, and the plaintiff company has thereby been damaged in the sum of ten thousand (10,000) dollars.

Wherefore the plaintiff company demands judgment against the said defendants (1) for the recovery of the possession of the said demanded premises, and (2) for the sum of ten thousand dollars damages, and for the costs of this action.

(S'g'd) G. G. SYMES,
9 *Att'y for Pl'ff Co.*

Endorsed: No. 1524. In U. S. circuit court. The Iron Silver Mining Co. *vs.* Joseph Reynolds *et al.* Complaint. Filed May 7, 1884. (S'g'd) Edward F. Bishop, clerk. G. G. Symes, att'y for pl'f.

And the said summons is in words and figures as follows, to wit:

Summons and Proof of Service.

In the Circuit Court of the United States for the District of Colorado.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

THE IRON SILVER MINING COMPANY, Plaintiff,
versus
JOSEPH REYNOLDS and J. D. MORRISSEY, Defendants.

Complaint filed in the clerk's office, this 8th day of May, A. D. 1884.

The President of the United States of America to Joseph Reynolds and J. D. Morrissey, Greeting:

You and each of you are hereby notified that an action has been brought in said court by The Iron Silver Mining Company,
10 plaintiff, against you, as defendants, to recover the possession of certain specific real property situate in California Mining District, county of Lake, and State of Colorado, consisting of $193\frac{43}{100}$ acres of land, more or less, and more particularly described by metes and bounds in the complaint filed herein, and to which reference is here made, together with the sum of $10,000 damages for the ouster and possession of a portion of said premises by defendants, and for the costs of this suit, as more fully set forth and described in the complaint filed herein, and to which reference is here made.

You are hereby required to appear and demur or answer to the complaint filed in said action in said court within ten days (exclusive of the day of service) after this summons shall be served on you, if such service shall be made within the county of Arapahoe, otherwise within forty days from the day of service; and if you fail so to do the said plaintiff will take judgment against you by default according to the prayer of the said complaint, and will apply to the court for the relief demanded therein.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said
11 circuit court, at the city of Denver, in said district, this 7th day of May, A. D. 1884, and of the Independence of the United States the 108th year.

(S'g'd) EDWARD F. BISHOP, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

[Seal circuit C't U. S., Colo.]

Proof of Service.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

LEADVILLE, *May 10th*, A. D. 1884.

I hereby certify that I received the within writ on the 10th day of May, A. D. 1884, and that I have personally served the same upon the said defendant, J. D. Morrissey, by delivering to J. D. Morrissey personally a true copy of the within writ at the time and place, as follows: As to J. D. Morrissey, at Leadville, county of Lake, on the 10th day of May, A. D. 1884; as to Joseph Reynolds, not found in my district.

This writ, therefore, returned partly executed as the law directs, this 2nd day of June, A. D. 1884.

(S'g'd) WALTER A. SMITH, *Marshal*,
By DAVID A. COWELL,
Deputy Marshal.

12 (Endorsed:) Gen. No. 1524. Circuit court of the United States for the district of Colorado. Iron Silver Mining Co., plaintiff, *versus* Joseph Reynolds *et al.*, defendants. Summons. Filed this 2 day of June, A. D. 1884. (S'g'd) Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. G. G. Symes, of Denver, attorney for plaintiff.

And afterwards, and on, to wit, the 7th day of October, A. D. 1884, came the said defendants, by Messrs. Morrison & Wenzell, their attorneys, and filed in said court and in said cause their answer to the complaint heretofore filed herein.

And the said answer is in words and figures as follows, to wit:

Answer.

UNITED STATES OF AMERICA, *ss:*

In the Circuit Court of the United States, District of Colorado.

THE IRON SILVER MINING COMPANY, Plaintiff,
v.
JOSEPH REYNOLDS and JOHN D. MORRISSEY, Defendants.

The defendants, answering the complaint, say:

13 For a first defense:

1. They deny that on the first day of January, A. D. 1884, or at any time, the plaintiff company was or is the owner or seized or possessed of the premises described in the complaint.

2. They deny that the said plaintiff claims or has an estate in fee simple or other estate in said premises, or at the times charged in the complaint, or at any time, was or is entitled to the possession, immediate, exclusive, or otherwise, of the said described land and premises. They deny that the defendants have wrongfully or unlawfully ousted the plaintiff company from, or have unlawfully retained or withheld, or do now wrongfully or unlawfully retain the said premises or the possession thereof from the plaintiff company. They deny that the value of the rents, issues, and profits mentioned in the complaint amounts to the sum of ten thousand dollars or any sum, and deny that the plaintiff company has been damaged in the sum of ten thousand dollars, or in any sum, or at all.

For a second defense:

1. The defendants say that at all times charged in the complaint the defendant, Joseph Reynolds, was, and still is, the owner,
14 and seized in fee of and in the actual possession of the Crown Point lode mining claim, survey lot No. 3241, and the Pinnacle lode mining claim, survey lot No. 259, which adjoin on its north side said placer claim described in the complaint, and that the vein or veins in said several lode mining claims in their course downwards dip into and underneath the exterior lines of the Wells and Moyer placer claim in the said complaint described.

2. That in following and working said vein or veins the defendant, Joseph Reynolds, as owner as aforesaid, and the defendant, John D. Morrissey, under the license of the said Joseph Reynolds, have entered underneath the exterior surface lines of said placer claim, following the said veins, as parcel of the premises embraced and included in said several survey lots, and have not otherwise entered upon the premises described in the complaint, or claimed by plaintiff as the said Wells and Moyer placer claim, or ousted the plaintiff from the possession thereof.

For a third defense:

1. That at the time of the survey, entry, and patenting of the said Wells and Moyer placer claim, a certain lode, vein, or deposit of

quartz or other rock in place carrying carbonates of lead and
15 silver-bearing ore, and of great value, called the Pinnacle lode, and a certain lode, vein, or deposit carrying like minerals of great value, were known and claimed to exist within the boundaries and underneath the surface of said placer claim, survey lot No. 281, and that the fact that such vein or veins were claimed to exist and did exist as aforesaid within said premises was known to the patentees of said claim at all the times hereinbefore mentioned, and that in the application for patent for said placer claim the said vein or veins so known to exist were not included, and were, in the patent issued upon such application, expressly excluded therefrom.

2. And further, in the said patent it was expressly and in terms reserved that the premises in and by such patent conveyed might, by the proprietor of any such vein or lode of quartz or other rock in place bearing mineral or ore as aforesaid, be entered for the purpose of extracting and removing the ore from such lode, vein or deposit, should the same or any part thereof be found to penetrate, intersect, pass through, or dip into the premises by such patent granted.

3. That the vein or deposit known as the Pinnacle lode and the vein or deposit known as the Crown Point lode were and had been at said times duly discovered, located, and of record by such
16 names, with surface grounds adjoining the exterior surface lines of said placer claim, and that the vein or veins in said lode claims then known to exist, afterwards, and before the commencement of this suit and before the several dates charged in the complaint, became the property in fee of the defendant, Joseph Reynolds, and that said vein or veins upon their dip come underneath said exterior surface lines of said placer claim, and that the defendant, Joseph Reynolds, as owner and proprietor thereof, and the defendant, Morrissey, by the license of such proprietor, have entered upon and followed said veins underneath said exterior surface lines of the Wells and Moyer placer claim, and not otherwise; and that the entry of defendants in following said veins, upon their dip under said exterior surface lines, in the only entry which the defendants or either of them have made upon or within the bounds of the so-called placer claim.

(S'g'd) MORRISON & WENZELL,
Att'ys for Defendants.

[Endorsed:] 1524. Iron Silver Co. Reynolds *et al.* Answer. Filed Oct. 7, 1884. (S'g'd) Edward F. Bishop, clerk. Morrison & Wenzell, Leadville.

17 And afterwards, and on, to wit, the 7th day of November, A. D. 1884, came again the said plaintiff, by its attorney aforesaid, and filed in said court and in said cause its replication to the answer heretofore filed herein.

And the said replication is in words and figures as follows, to wit:

Replication.

In the Circuit Court of the United States for the District of Colorado.

THE IRON SILVER MINING COMPANY
against
JOSEPH REYNOLDS and JOHN D. MORRISSEY.

The said plaintiff company, for replication to the answer of the said defendants herein, denies that the said defendant, Joseph Reynolds, was at any time, or still is, the owner, or seized in fee, or in the possession of the Crown Point lode mining claim or survey lot No. 3241, or of the Pinnacle lode mining claim or survey lot No. 259, and denies that the vein or veins in the said last alleged lode mining claim, or any veins or lodes, in their course downward or otherwise, dip into or underneath the exterior lines of the said Wells and Moyer placer claim, and denies that the said defendants
18 have not entered underneath the surface of the said placer claim except by following a vein or lode included in the said alleged lode claims, on their dip; but plaintiff avers that they have entered upon the vein, lode and mineral deposit lying underneath the surface of the said Wells and Moyer patented placer claim, without in in any way following the dip or downward course of any lode, vein, lead, or mineral deposit.

And plaintiff company denies that at the time of the survey, or at the time of the entry or patenting of the said Wells and Moyer placer claim, any certain lode, vein, or deposit of quartz or other rock in place carrying carbonates of lead and silver-bearing ore of any kind, called the Pinnacle lode, or any other lode, vein, or deposit, carrying any valuable minerals, were known or claimed to exist within the boundaries or underneath the surface of the said placer claim or survey lot No. 281, or that any such alleged fact that such a vein or veins were claimed or known to exist within the said placer patented premises was known to the patentees of the said placer claims at such times, and denies that any such vein or veins, or lodes, or any veins or lodes, found within the said patented placer premises were excluded or excepted from the said patent or grant.

Plaintiff company denies that it was expressly, or in any
19 terms, or in any way, reserved in said placer patent that the premises conveyed by the said placer patent might be entered by the proprietor of any lode or vein of quartz or other rock in place bearing any mineral or ore for the purpose of extracting or removing the ore from said lode, vein, or deposit should the same or any part thereof be found to penetrate, pass through, or dip into the premises conveyed by such patent grant.

The plaintiff company avers that the said patent only reserved the right to grantees or owners of other lode claims to follow upon the dip or downward course of any vein or deposit into or underneath the surface of the said patented placer premises when it shall appear that within such adjoining lode mining claims there was

found developed and known to exist the top, apex, or outcrop of a vein, lode, or mineral deposit which, upon its dip or downward course, is found to penetrate, intersect, and underlie the surface of the said patented placer mining premises.

And plaintiff avers that within the said alleged Crown Point or Pinnacle lode mining claims described in the said answer there is not found, there is not discovered, and there does not exist the top, outcrop, or apex of any lode, lead, or valuable mineral deposit, and there is no vein, lode, or valuable mineral deposit of any kind within the said alleged Crown Point or Pinnacle lode mining claims
20 which dip from the said lode claims into or underneath the said patented placer claim.

And plaintiff company denies that any vein, lode, or valuable mineral deposit known as the Pinnacle lode and vein or as the Crown Point lode and vein, or any lode, vein, or mineral deposit whatever, has been discovered, located, or recorded by any one whatever within the boundaries of the said Crown Point and Pinnacle lode mining claims, or that any vein, lode, lead, or valuable mineral deposit was known to exist within the boundaries of the said alleged Crown Point and Pinnacle lode claim- before the commencement of this suit or before the date or time of the application of the said Wells and Moyer placer patent.

And denies that the said defendant, Joseph Reynolds, has become the owner or seized in fee or otherwise of any vein or lode or valuable mineral deposit which dips into or lies underneath the surface of the said patented placer mining claim, or that any such vein, lode, or lead or valuable mineral deposit is or was found within the exterior boundaries of the said alleged Crown Point and Pinnacle lode mining claims.

And for further replication herein the said plaintiff company alleges:

That at all times heretofore charged in the answer of the
21 said defendants, it has been and still is the owner and seized in fee of and in the actual possession of the Rock Lode mining claim and the Dome lode mining claim, which adjoin immediately on the north side of the said alleged Pinnacle and Crown Point mining claims, and that within the exterior boundaries of the said Rock and Dome lode mining claims there is a vein, lode, lead, and valuable mineral deposit of quartz and other rock in place bearing silver and lead, and which has its top, apex, and outcrop, or highest end within the exterior boundary lines of the said Rock and Dome lode mining claims, and which said lode, vein, lead, and valuable mineral deposit on its dip and downward course enters into and underlies the land adjoining, a portion of which land adjoining consists of ground covered by the said alleged Crown Point and Pinnacle lode mining claims.

And plaintiff company avers that any portion or part of any vein, lode, lead, or valuable mineral deposit of any kind which is found or developed underneath the surface of the said Crown Point and Pinnacle lode claims is a part and portion of the said Rock and Dome lode veins and mineral deposits, which have their top, apex,

and outcrop within the exterior boundary lines of the said Rock and Dome lode mining claims, and which dips, as aforesaid, on their downward course, into the said Pinnacle and Crown Point lode mining claims.

22 Wherefore plaintiff company prays judgment as it has heretofore prayed in its said complaint.

(S'g'd) G. G. SYMES,
Att'y for Pl'ff Co.

[Endorsed:] No. 1524. In the circuit court of the U. S. The Iron S. M. Co. *vs.* Joseph Reynolds *et al.* Replication. Filed Nov. 7, 1884. (S'g'd) Edward F. Bishop, clerk.

And afterwards and on, to wit, the 17th day of November, A. D. 1884, the same being one of the regular juridical days of the October term, A. D. 1884, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order. Trial Commenced.

THE IRON SILVER MINING COMPANY
vs.
JOSEPH REYNOLDS and J. D. MORRISSEY. } 1524.

Action for possession of specific real property and for damages.

23 At this day comes the said plaintiff, by Mr. G. G Symes, Esq., its attorney, and the said defendants, by R. S. Morrison, Esq., their attorney, also come.

And thereupon comes a jury, to wit: Henry W. Betts, H. P. Heath, Edwin C. Currier, Charles Alger, Robert Harris, P. T. Hughes, John S. Hester, William F. Hunt, Charles E. Davis, George M. McAdams, Nelson G. Hurd, Nathan C. Hughes, twelve good and lawful men, and they are duly selected and tried, impaneled and sworn to well and truly try the issue herein joined and a true verdict render according to the evidence; and thereupon comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves, or with others, touching this cause or the matters at issue herein, or the evidence heard, or any part thereof, nor listen to such conversation of others, are permitted to separate to meet the court at its next incoming.

And afterwards, and on, to wit, the 18th day of November, A. D. 1884, the same being one of the regular juridical days of the October term, A. D. 1884, of said court—present, the Honorable

24 Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order. Trial Continued. Plaintiff Dismisses as to Damages. Leave to Amend Complaint. Verdict for Plaintiff.

THE IRON SILVER MINING COMPANY
vs.
JOSEPH REYNOLDS and J. D. MORRISSEY. } 1524.

Action for possession of specific real property and for damages.

At this day come again the said parties by their attorneys, respectively, and the said jurors being now all here present, and in the jury-box, the hearing of the evidence herein is resumed.

And thereupon the said plaintiff saith it will no further prosecute its suit in this behalf as to its claim for damages against the said defendants.

Wherefore it is considered by the court that the said defendants, as to said plaintiff's claim for damages herein, go hence hereof without day.

Upon motion of the said plaintiff it is ordered by the court that it have leave to amend its complaint herein as to the description of the premises claimed.

25 And the said jurors having heard the evidence produced and the instructions of the court upon their oaths do say: They find the issues for the plaintiff company and that it is the owner in fee of the land described in the complaint and amendment thereto in this action, and entitled to recover the possession of the same.

And thereupon, and on the same day, to wit, the 18th day of November, A. D. 1884, came again the said plaintiff, by its attorney aforesaid, and filed in said court and in said cause its amendment to the complaint heretofore filed herein.

And the said amended complaint is in words and figures as follows, to wit:

Amended Complaint.

In the Circuit Court of the United States for the District of Colorado.

THE IRON SILVER MINING COMPANY
against
JOSEPH REYNOLDS *et al.*, Defendants.

The said plaintiff, The Iron Silver Mining Company, for amendments to the said complaint herein, in this action, filed by

26 leave of this court, first had and obtained, amends the said complaint, as follows, to wit:

Insert in the said complaint, beginning at line fifteen (15), on page six (6), after the following words, namely, containing 193 & $\frac{43}{160}$ acres of land, more or less, the following, that is to say, saving and excepting out of the said patented tract of land the following pieces or parcels thereof, that is to say, all that part of the said Wells and

Moyer placer mining claim, hereinabove described, being United States survey number 281, United States mineral entry and series of said land office number 155, and particularly described as follows, to wit:

Beginning at a point on the boundary line of said U. S. survey No. 281, between corner No. 28 and 29 thereof, whence said corner No. 28 bears N. 40° W. 483.4 feet, thence running south 18° E. 159.1 feet, thence N. 12° E. 6,429 feet to said boundary line, thence N. 40° W. 171.5 feet to place of beginning.

The plat and field notes of survey being on file in the office of surveyor general for Colorado at Denver, Colorado, and to which reference is herein made, excepting and reserving from said survey No. 281; also the following described parcel of said placer claim, for which said Wells and Moyer have executed a bond for a deed to George Hayes *et als.*, and being a part of Wm. Redick lode,
27 as claimed by them as above described, and the following bonded to John Thompson, and described as follows, to wit:

All that part of what is known as U. S. mineral survey No. 281 of the placer claim of Thos. S. Wells and William Moyer, and also as mining application No. 189 at the U. S. land office, at Fairplay, Colorado, of the date of May 17th, 1878, which lies within the boundary lines of the Pennsylvania lode, ledge, or deposit described, located and owned by the said John Thompson, excepting and reserving to themselves, the parties of the first part, forever the full right, title, and interest in and to all surface, soil, gravel, or, in other words, placer diggings which they may discover on the piece of land hereby conveyed, which is more particularly described as follows, to wit:

Beginning at corner No. 9 of said Wells and Moyer placer mining claim, a granite stone marked 9—281, thence N. 72° 08′ E. in the direction of corner No. 3, survey 281, 189 feet to the intersection of said line with the east boundary line of Pennsylvania lode; thence N. 5° 08′ W. 92 feet to cor. No. 4 of the Pennsylvania lode; thence S. 83 52 W. 300 ft. to N. W. cor. No. 1 of Pennsylvania lode, a pine post 4x4x4 feet long; thence S. 6° 08′ E. along the west side line of the Pennsylvania lode 599½ feet to the intersection of said line with the line from corner No. 10 to cor. No. 11, survey
No. 281; thence N. 39° 56′ E. 102.5 feet to corner No. 10, sur-
28 vey No. 281; thence due north to corner No. 9, survey 281, the place of beginning. Variations in all courses, 15° east.

And also excepting and reserving the following-described parcel of land embraced in said survey No. 281:

Beginning at corner No. 1, a stake in mound of stones, from which corner No. 7 of survey No. 281 bears N. 56° E. 542 feet; thence from said corner No. 1 W. 100 feet to corner No. 2; thence from corner No. 2 N. 300 feet to corner No. 3; thence from corner No. 3 E. 100 feet to corner No. 4; thence from corner No. 4 S. 300 feet to place of beginning. Variation in all courses 15° E., containing 6,889 acres.

And also excluding and reserving from said Wells and Moyer placer mining claim, survey No. 281, the following-described parcel

of said placer mining claim, for which said Wells & Moyer have executed a bond for a deed to J. B. S. McCreagh, James McPhelemy, & A. Donath, said tract being described as follows, to wit:

Beginning at S. W. corner of "Genessee lode," thence N. 40° W. 880.97 feet to intersection with — south of Pinnacle lode; thence N. 65° 15′ E. 292.15 feet to corner 25—281; thence N. 50° W. 310 feet to corner 26—281; thence S. 65° W. 198.53 feet to corner 28—281; thence S. 40° E. 1,117.3 ft. to S. E. corner of Gressee lode; thence S. 4,665 feet to the place of beginning; containing 6.02 acres, more or less.

And also excluding and reserving from said Wells and Moyer placer mining claim, survey No. 281, the following-described parcels of said placer claim, for which said Wells & Moyer have executed a bond for a deed to Ed. D. Hepburn *et als.*, provided said Hepburn *et als.* shall strike a vein of ore in rock in place on said premises before the first day of April next; said parcel of land being described as follows, to wit:

From corner No. 1, N. E. corner of "Nisi Prius" lode; thence N. 55° 20′ E. 300 feet, to corner No. 2; thence northwesterly about 1,066 feet to corner No. 18, survey No. 281, same as southeast corner of "Pinnacle" lode; thence westerly 300 feet to corner No. 19, survey No. 281, same as S. W. corner of Pinnacle; thence southerly about 1,066 feet to place of beginning, the exterior boundaries of the said Wells and Moyer placer mining claim, survey No. 281, being as follows, to wit:

Variation in all courses 15° east. Beginning at corner No. 1, porphyry rock, 5x6x9″, set 7″ deep and marked 1—281, on N. side of "California Gulch," just above the mouth [of] Migget Gulch, from which a U. S. L. M. No. 1 bears N. 73° 1′ 36″ W. 10,890.63 feet, and the peak of Bald Mountain bears S. 65° 35′ E.; thence S. 79° 28′ E. 390.5 ft. to corner No. 2; thence S. 58° 8′ E. 721 feet to corner No. 3; thence S. 25° 4′ W. 681 feet to corner No. 4; thence S. 66° 8′ E. 738 feet to corner No. 5; thence S. 29° 48′ W. 133 feet to corner No. 6; thence north 72° 50′ W. 250 ft. to corner No. 7; thence S. 20° 48′ W. 845 feet to cor. No. 8; thence S. 72° 8′ W. 200 feet to corner No. 9; thence S. 400 feet to cor. No. 10; thence S. 39° 56′ W. 750 feet to cor. No. 11; thence W. 1,291 feet to cor. No. 12; thence S. 1,164.10 feet to corner No. 13; thence W. 3,594.16 feet to cor. No. 14; thence N. 26° W., 1,138.69 feet to cor. No. 15; thence E. 590 feet to cor. No. 16; thence N. 65° 15′ E. 527 ft. to cor. No. 17; thence S. 50° E. 472.47 ft. to cor. No. 18; thence N. 65° E. 531.29 ft. to cor. No. 19; thence S. 190 ft. to cor. No. 2–; thence E. 300 ft. to cor. No. 21; thence N. 329.89 ft. to cor. No. 22; thence N. 65° E. 152.7 ft. to cor. No. 23; thence S. 50° E. 8.66 ft. to cor. No. 24; thence N. 65° 15′ E. 300 ft. to cor. No. 25; thence N. 50° W. 310 ft. to cor. No. 26; thence S. 63° W. 198.52 ft. to cor. No. 29; thence N. 409.85 feet to cor. No. 28; thence S. 40° E. 1,500 ft. to cor. No. 29; thence N. 466.5 feet to cor. No. 30; thence N. 40° W. 852.65 ft. to cor. No. 31; thence N. 18° W. 772.25 ft. to cor. No. 32; thence N. 46° E. 822 ft. to cor. No. 33; thence E.

189.29 ft. to cor. No. 34; thence 474.95 ft. to cor. No. 1, the place of beginning.

31 And the said plaintiff company alleges that it is the owner and seized of all of the said land included within the exterior boundaries of the said patented placer claim survey lot No. 181, except the portions *and* thereof last herein above particularly described, and the owner of all the leads, lodes, ledge, and valuable mineral deposits, of every kind and character, and all the mineral, bearing rock and earth, ores, and metals therein found.

(S'g'd) G. G. SYMES,
Att'y for Pl'ff Co.

[Endorsed:] No. 1524. In U. S. Circuit Court. The Iron Silver Mining Company *vs.* Joseph Reynolds *et als.* Amended complaint. Filed Nov. 18, 1884. (S'g'd) Edward F. Bishop, clerk.

And afterwards, and on, to wit, the 29th day of December, A. D. 1884, the same being one of the regular juridical days of the October term, A. D. 1884, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

32 *Order. Motion for New Trial Overruled. Cause to be Submitted to Supreme Court under 20th Rule. Judgment to be entered.*

THE IRON SILVER MINING COMPANY
vs.
JOSEPH REYNOLDS and J. D. MORRISSEY. } 1524.

Action for possession of specific real property and for damages.

At this day comes the said plaintiff, by G. G. Symes, Esq., its attorney, and the said defendants, by R. S. Morrison, Esq., their attorney, also come:

And the motion of the said defendants for a new trial herein coming on now to be heard is argued by counsel; and being now sufficiently advised in the premises, it is ordered by the court that the said motion be denied, upon this condition nevertheless, that if the said defendants, or any of them, shall remove this cause into the Supreme Court of the United States, and shall desire to submit the same to the said Supreme Court under and in pursuance to the 20th rule of practice in the said Supreme Court, then and in that case the said plaintiff shall join in such submission, and proceed according to the terms of said rules, and failing in that regard, this court shall be at liberty at any term thereafter to vacate and set aside all orders made in this cause on this day, and the judgment
33 now to be entered; to which the said plaintiff by its counsel now assents.

Wherefore let judgment be entered upon the verdict of the jury herein in favor of the said plaintiff and against the said defendants for the possession of the premises described in the complaint, and the said plaintiff's costs to be taxed.

And thereupon, and on the same day, to wit, the 29th day of December, A. D. 1884, judgment was duly entered against the said defendants in the "judgment-book" of said court, in pursuance of the statutes and rules of court; and the said judgment is in words and figures as follows, to wit:

Judgment.

THE IRON SILVER MINING COMPANY
vs.
JOSEPH REYNOLDS and J. D. MORRISSEY. } 1524.

Action for possession of specific real property and for damages.

On this 29th day of December, A. D. 1884, the same being one of the regular juridical days of the October term, A. D. 1884, there being present the Honorable Moses Hallett, district judge, it is considered by the court that the said plaintiff do have
34 and recover of and from the said defendants possession of the property, lands, and tenements in said complaint described, to wit: That certain tract of land and mining claim, situated in California Mining District, county of Lake and State of Colorado, consisting of one hundred and ninety-three and forty-three one-hundredths ($193\frac{43}{100}$) acres of land, more or less, and more particularly described by metes and bounds in the United States patent issued therefor as follows, with magnetic variation fifteen (15) degrees east, to wit:

35 Beginning at cor. No. 1, a porphyry rock 5x6x9 in. in size, marked 1—281, from which U. S. locating monument No. 1 bears N. 73° 1′ 36″ W. at 10,870 and $\frac{63}{100}$ ft. and the Peak of Bald Mt. bears S. 65° 35′ E.; thence from cor. No. 1, S. 79° 28′ E. 590.5 ft. to cor. No. 2, a porphyry rock 5x7x12 in. in size, marked 2—281; thence S. 58° 8′ E. 436 ft. to road, 721 ft. to cor. No. 3, a granite rock 5x7x13 in. in size, marked 3—281; thence S. 25° 4′ W. 68 ft. to cor. No. 4, a granite rock 7x8x8 in. in size, marked 4—281; thence S. 66° 8′ E. 733 ft. to cor. No. 5, a granite rock 7x11x13 in. in size, marked 5—281; thence S. 29° 48′ W. 20 ft. to N. bank of California Gulch, 66 ft. to stream, 90 ft. to S. bank of California Gulch, 133 ft. to cor. No. 6, a quartz rock 8x11x12 in. in size, marked 6—281; thence N. 72° 50′ W. 250 ft. to cor. No. 7, a quartz rock 6x8x12 in. in size, marked 7—281; thence S. 20° 48′ W. 240 ft. to N. bank of Eureka Gulch, 550 ft. to S. bank of said gulch, 845 ft. to cor. No. 8, a porphyry rock 7x9x12 in. in size, marked 8—281; thence S. 72° 8′ W. 200 ft. to cor. No. 9, a porphyry rock 5x7x10 in. in size, marked 9—281; thence S. 400 ft. to cor. No. 10, a quartz rock 5x6x10 in. in size, marked 10—281, from which a blazed pine tree 13 in. in diameter bears N. 32° 10′ E. 8.3 ft., and a pine 14 in. in diameter, blazed, & marked 10—281, bears S. 71° 38′ E. — ft.; thence from
36 cor. No. 10 S. 39° 56′ W. 750 ft. to cor. No. 11, a quartz rock 4x 8x11 in. in size, marked 11—281, from whence a pine tree 16 in. in diameter, blazed, and marked 11—281, bears N. 62° 12′ E. 12 ft., & a pine tree 9 in. in diameter, blazed, and marked 11—281, bears S.

15° 21′ E. 8.10 ft; thence from said cor. No. 11 W. 128.71 ft. to cor. No. 12, a granite rock 5x7x11 in. in size, marked 12—281, from which a pine tree 13 in. in diameter, blazed, and marked 12—281, bears S. 5° 13′ E. 16.2 ft., and a pine tree 11 in. in diameter, blazed, and marked 12—281, bears S. 59° 8′ W. 14.8 ft.; thence from cor. No. 12, S. 1,104.1 ft. to cor. No. 13, a granite rock 5x11x14 in. in size, from which Mt. Sheridan bears S. 73° 36′ E., monument on Mt. Elbert bears S. 54° 46′ W., a pine tree 9 in. in diameter, blazed, and marked 13—281, bears S. 24° 8′ W. 10.5 ft., and a pine tree 5 in. in diameter, blazed, and marked, bears N. 77° 47′ W. 13 ft.; thence from cor. No. 13 W. 3,590.16 ft. to cor. No. 14, a granite rock 5x10x14 in. in size, marked 14—281, from which a pine tree 11 in. in diameter, blazed, & marked 14—281, bears N. 29° 32′ E. 11.2 ft., & a blazed pine tree 12 in. in diameter, marked 14—281, bears N. 71° 25′ W. 31 ft.; thence from cor. 14 26 W. 1,138.69, to cor. No. 15, a quartz rock 5x7x9 in. in size, marked 15—281, from which a blazed pine tree 17 in. in diameter bears N. 65° 15′ W. at 11.01 ft., a double pine tree, blazed, & marked 15—281, bears S.
37 19° 10′ E. 10 ft.; thence from cor. No. 15 E. 590 ft. to cor. No. 16, a porphyry rock 7x8x11 in. in size, marked 16—281, the same being cor. No. 3 of sur. No. 336; thence N. 65° 15′ E. along the southerly boundary of said sur. 236, 527 ft. to cor. No. 17, a porphyry rock 5x12x12 in. in size, marked 17—281, the same being cor. No. 1 of sur. No. 259; thence S. 50° E. 472.47 ft. to cor. No. 18, a granite rock 3x8x14 in. in size, marked 18—281, the same being cor. No. 2 of said sur. No. 259; thence N. 65° E. 531.29 ft. to cor. No. 19, a granite rock 5x5x15 in. in size, marked 19—281; thence S. 190 ft. along the western boundary of the Oro La Plata lode to cor. No. 20, a granite rock 6x6x18 in. in size, marked 20—281, from which a blazed pine tree 7 in. in diameter bears N. 19° 30′ E. 5.5 ft., & a blazed pine tree 12 in. in diameter bears S. 80° 30′ W. 19 ft.; thence from cor. No. 20 E. along the S. boundary of said Oro La Plata lode 30 ft. to cor. No. 21, a granite rock 6x7x— in. in size, marked 21—281, from which a blazed pine tree 14 in. in diameter bears N. 72° 6′ E. 21.1 ft., and a blazed pine tree 6 in. in diameter bears N. 35° 33′ E. 12.8 ft.; thence from cor. No. 21 N. along the E. boundary of said Oro La Plata lode 399.89 ft. to cor. 22, a quartz rock 6x6x9 in. in size, marked 22—281; thence N. 65° E. 152.7 ft. to cor.
38 23, a lime rock marked 23—281, the same being cor. No. 3 of sur. No. 259, from which a blazed pine tree 14 in. in diameter bears S. 72° 4′ E. 11.8 ft., & a blazed pine tree 10 in. in diameter bears N. 16° 30′ E. 26 ft.; thence from cor. No. 23 S. 50° E. 8.66 ft. to cor. No. 24, a granite rock marked 24—281, the same being cor. No. 4 of sur. No. 259, from which a blazed pine tree 13 in. in diameter bears N. 1° 12′ E. 30.7 ft.; thence from cor. No. 24 N. 65° 15′ E. 300 ft. to cor. No. 25, a granite rock marked 25—281, the same being No. 25 of sur. No. 259, from which a blazed pine tree 18 in. in diameter bears N. 89° 20′ W. 12.5 ft., and a blazed pine tree 15 in. in diameter bears S. 4 ft.; thence from cor. No. 25 50° W. 310 ft. to cor. No. 26, a granite rock 5x9x12 in. in size, marked 26—281, the same being cor. No. 26 of sur. No. 259, from which a blazed pine

tree 16 in. in diameter bears S. 10° 31′ W. 33 ft., & a blazed pine tree 13 in. in diameter bears S. 45° 42′ W. 15.2 ft.; thence from cor. No. 26 S. 65° W. 198.52 ft. to cor. No. 27, a granite rock 7x9x11 in. in size, marked 27—281, from which a blazed pine tree 14 in. in diameter bears N. 19° 50′ E. 6 ft., a blazed pine tree 12 in. in diameter bears N. 72° 24′ W. at 27.5 ft.; thence from cor. No. 27 N. 409.89 ft. to cor. No. 28, a porphyry rock 6x8x16 in. in size, marked 28—281, the same being cor. No. 3 of sur. No. 278, from which a blazed pine tree 14 in. in diameter
39 bears N. 13° 46′ W. 29.8 ft., and a blazed pine tree 16 in. in diameter bears S. 58° 27′ E. 18 ft.; thence from cor. No. 28 S. 40° E. 150 to cor. No. 29, the same being cor. No. 4 of sur. No. 278, from which a blazed pine tree 16 in. in diameter bears S 71° 32′ W. 19.3 ft., and a blazed pine tree 16 in. in diameter bears N. 22° 25′ E. 5.7 ft.; thence from cor. No. 29 N. 466.5 ft. to cor. No. 30, a porphyry rock 4x8x14 in. in size, marked 30—281, the same being cor. No. 5 of sur. No. 278, from which a pine tree 20 in. in diameter bears N. 87° 25′ W. 17.17 ft., and a blazed pine tree 12 in. in diameter bears N. 50° 10′ E. 29 ft.; thence from cor. No. 30 N. 40° W. 852.65 ft. to cor. No. 31, a porphyry rock 6x8x12 in. in size, marked 31—281, from which a blazed pine tree bears N. 57° 31′ E. 17 ft., and a blazed pine tree 14 in. in diameter bears N. 42° 16′ W. 12.9 ft.; thence from cor. No. 31 N. 18°, W. 722.25 ft. to cor. No. 32, a porphyry rock 7x8x15 in. in size, marked 32—281; thence N. 46° E. 822 ft. to cor. No. 33, a porphyry rock 3x6x18 in. in size, marked 33—281; thence E. 189.29 ft. to cor. No. 34, a porphyry rock 3x4x8 in. in size, marked 34—281, from which a blazed pine tree 18 in. in diameter bears N. 33° 30′ E. 4 ft.; thence from cor. No. 34 N. 324.95 ft. to S. bank of California Gulch, 374.95 ft. to stream in said gulch,
40 409.95 ft. to N. bank of said gulch, 464.95 ft. to county road, 474.95 ft. to the place of beginning; containing 193.43 acres of land, more or less. Saving and excepting out of the said patented tract of land the following pieces or parcels thereof, that is to say, all that part of the said Wells & Moyer placer mining claim hereinabove described, being United States survey numbered 281, United States mineral entry and series of said land office number 155, and particularly described as follows, to wit:

Beginning at a point on the boundary-line of said U. S. survey No. 281, between corner No. 28 and 29 thereof, whence said corner No. 28 bears N. 40° W. 483.4 feet; thence running south 18° E. 159.1 feet; thence N. 72° E. 64.27 to said boundary-line; thence N. 40° W. 171.5 feet to place of beginning, the plat and field-notes of survey being on file in the office of surveyor general of Colorado, at Denver, Colorado, and to which reference is herein made. Excepting and reserving from said survey No. 281 also the following-described parcel of said placer claim for which said Wells and Moyer have executed a bond for a deed to George Hayes *et als.*, and being a part of Wm. Redick lode, as claimed by them, as above described, and the following bonded to John Thompson and described as follows, to wit: All that part of what is known as U. S. mineral survey

No. 281 of the placer claim of Thos. S. Wells and Willian Moyer,
41 and also as mining application No. 189 at the U. S. land
office at Fairplay, Colorado, of the date of May 17th, 1878, which lies within the boundary-lines of the Pennsylvania lode, ledge, or deposit, described, located, and owned by the said John Thompson. Excepting and reserving to themselves, the parties of the first part, forever, the full right, title, and interest in and to all surface, soil, gravel, or, in other words, placer diggings, which they may discover on the piece of land hereby conveyed, which is more particularly described as follows, to wit: Beginning at corner No. 9 of said Wells and Moyer placer mining claim, a granite stone marked 9—281; thence N. 72° 08′ E., in the direction of cor. No. 8, survey 281, 1.89 feet to the intersection of said line with the east boundary-line of Pennsylvania lode; thence N. 6° 08′ W. 92 feet to cor. No. 4 of the Pennsylvania lode; thence S. 83° 52′ W. 300 feet to N.W. corner No. 1 of Pennsylvania lode, a pine post 4x4x4 *feet* long; thence S. 6° 08′ E. along the west side line of the Pennsylvania lode 599½ feet to the intersection of said line with the line from corner No. 10 to cor. No. 11, survey No. 281; thence N. 39° 56′ E. 102.5 feet to cor No. 10, survey No. 281; thence due north to corner No. 9, survey No. 281, the place of beginning. Variation in all courses 15° E. And also excepting and reserving the following-described
42 parcel of land embraced in said survey No. 281: Beginning
at cor. No. 1, a stake in mound of stones, from which cor. No. 7, of survey No. 281, bears N. 56° E. 542 feet; thence from said corner No. 1 W. 100 feet to corner No. 2; thence from cor. No. 2 N. 300 ft. to cor. No. 3; thence from cor. No. 3 E. 100 ft. to cor. No. 4; thence from corner No. 4 S. 300 feet to place of beginning. Variation in all courses 15° E.; containing 0.6887 acres. And also excluding and reserving from said Wells and Moyer placer mining claim survey No. 281 the following-described parcel of said placer mining claim, for which said Wells and Moyer have executed a bond for a deed to J. B. S. McCreagh, James McPhelemy, and A. Donath, said tract being described as follows, to wit: Beginning at S. W. corner of "Genesee lode;" thence N. 40° W. 880.97 feet to intersection with south of Pinnacle lode; thence N. 65° 15′ E. 292.15 feet to corner 25—281; thence N. 50° W. 310 feet to corner 26—281; thence S. 65° W. 198.53 feet to corner 27—281; thence N. 409.85 feet to corner 28—281; thence S. 40° E. 1,117.3 ft. to S. E. corner of Gresee lode; thence S. 4° 66.5 feet to the place of beginning; containing 6.02 acres, more or less. And also excluding and reserving from said Wells and Moyer placer mining claim survey No. 281 the following-described parcel of said placer claim, for which said Wells and Moyer have executed a bond for a deed to Ed. B. Hepburn *et als.*, provided said Hepburn *et als.*, shall strike a vein of ore in rock
in place on said premises before the first day of April next,
43 said parcel of land being described as follows, to wit:

From corner No. 1, N. E. corner of "Nisi Prius" lode; thence N. 55° 20′ E. 300 feet to corner No. 2; thence northwesterly about 1,066 feet to corner No. 18, survey No. 281, same as southeast corner of "Pinnacle lode;" thence westerly 300 feet to corner No. 17,

survey No. 281, same as S. W. corner of "Pinnacle;" thence southerly about 1,066 feet to place of beginning. The exterior boundaries of the said Wells and Moyer placer mining claim survey No. 281 being as follows, to wit, variation in all courses 15° east: Beginning at corner No. 1, a porphyry rock 5x6x9 set 7″ deep, and marked 1—281, on N. side of "California Gulch," just above the mouth [of] Nugget Gulch, from which a U. S. L. M. No. 1 bears N. 73° 1′ 36″ W. 10,890.63 feet, and the peak of Bald Mountain bears S. 65° 35′ E.; thence S. 79° 28′ E. 390.5 feet to corner No. 2; thence S. 58° 8′ E. 721 feet to corner No. 3; thence S. 25° 4′ W. 681 feet to corner No. 4; thence S. 66° 8′ E. 738 feet to corner No. 5; thence S. 29° 48′ W. 133 feet to corner No. 6; thence north 72° 50′ W. 250 ft. to corner No. 7; thence S. 20° 48′ W. 845 feet to corner No. 8; thence S. 72° 8′ W. 200 feet to corner No. 9; thence S. 400 feet to corner No. 10; thence S. 39° 56′ W. 750 feet to cor. No. 11; thence W. 1,271 feet to cor. No. 12; thence S. 1,164.10 feet to corner
44 No. 13; thence W. 3,594.16 feet to cor. No. 14; thence N. 0° 26′ W. 1,138.69 ft. to cor. No. 15; thence E. 590 feet to cor. No. 16; thence N. 65° 15′ E. 527 ft. to cor. No. 17; thence S. 50° E. 472.47 ft. to cor. No. 18; thence N. 65° E. 531 ft. to cor. No. 19; thence S. 190 ft. to cor. No. 20; thence E. 300 ft. to cor. No. 21; thence N. 329.89 ft. to cor. No. 22; thence N. 65° E. 152.7 ft. to cor. No. 23; thence S. 50° E. 8.66 ft. to cor. No. 24; thence N. 65° 15′ E. 300 feet to cor. No. 25; thence N. 50° W. 310 ft. to cor. No. 26; thence S. 63° W. 198.52 ft. to cor. No. 27; thence N. 409.85 feet to cor. No. 28; thence S. 40° E. 1,500 ft. to cor. No. 29; thence N. 466.5 feet to cor. No. 30; thence N. 40° W. 852.65 ft. to cor. No. 31; thence N. 18° W. 772.25 ft. to cor. No. 32; thence N. 46° E. 822 ft. to cor. No. 33; thence E. 189.29 ft. to cor. No. 34; thence 474.95 ft. to cor. No. 1, the place of beginning, and that it have a writ of possession therefor.

It is further considered by the court that the said plaintiff do have and recover of and from the said defendants its costs by it in this behalf laid out and expended, to be taxed, and have execution therefor.

And afterwards, and on, to wit, the 13th day of January, A. D. 1885, came again the said defendants, by their attorneys afore-
45 said, and filed in said court and in said cause their bond, and sued out of said court a writ of error and citation to the Supreme Court of the United States. And the said bond is in words and figures as follows, to wit:

Bond on Writ of Error.

THE UNITED STATES OF AMERICA, *District of Colorado:*

Know all men by these presents, that we, Joseph Reynolds and John D. Morrissey, as principals, and Samuel Adams & E. T. Holden, as sureties, are held and firmly bound unto the Iron Silver Mining Company in the full and just sum of five hundred dollars, to be paid to the said Iron Silver Mining Company; and to which payment, well and truly to be made, we bind ourselves, our heirs, executors,

and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 31st day of Dec'r, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately, at the October term, A. D. 1884, of the circuit court of the United States for the district of Colorado, in a suit pending in said court between the Iron Silver Mining Company, plaintiff, and Joseph Reynolds and John D. Morrissey, defendants, judgment was rendered against the said Joseph Reynolds and John D. Mor-
46 rissey, and they, the said defendants, having obtained a writ of error to reverse the judgment of said court, and a citation directed to the said The Iron Silver Mining Company, citing and admonishing it to be and appear at a Supreme Court of the United States, to be held at Washington on the second Monday of October next:

Now the condition of the above obligation is such, that if the said Joseph Reynolds and John D. Morrissey shall prosecute said suit to effect, and answer all damages and costs, if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

(S'g'd)	JOSEPH REYNOLDS.	[SEAL.]
"	JOHN D. MORRISSEY.	[SEAL.]
"	SAMUEL ADAMS.	[SEAL.]
"	E. T. HOLDEN.	[SEAL.]

Approved.
(S'g'd) MOSES HALLETT, *Judge.*

Justification.

THE UNITED STATES OF AMERICA, }
District of Colorado, County of Lake, } *ss:*

I, Samuel Adams and E. T. Holden, sureties on the within bond, being each first duly sworn, deposes and saith: That he is worth in real property & money the sum below set opposite his name,
47 that is to say, as to Adams, three thousand dollars; as to Holden, three thousand dollars, over and above all his just debts and liabilities, and in property subject to levy and sale upon execution.

(S'g'd) SAM'L ADAMS.
" E. T. HOLDEN.

Subscribed and sworn to before me, at Leadville, this 6th day of January, A. D. 1885.

[SEAL DIST. COURT.] (S'g'd) J. H. PLAYTER,
Clerk Dist. Court, Lake County,
By THOMAS W. LEONARD,
Deputy Clerk.

(Endorsed:) Gen. No. 1524. Circuit court of the United States, district of Colorado. The Iron Silver Mining Company *vs.* Joseph Reynolds, John D. Morrissey. Bond, $500.00. Filed this 13 day of Jan'y, A. D. 1885. (S'g'd) Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk.

And the said citation and writ of error are hereto attached, to wit:

48 *Writ of Error to Supreme Court U. S., District of Colorado.*

The United States of America.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

The President of the United States to the judges of the circuit court of the United States for the district of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court, between The Iron Silver Mining Company, plaintiff, and Joseph Reynolds and John D. Morrissey, defendants, a manifest error hath happened, to the great damage of the said Joseph Reynolds and John D. Morrissey, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 13th day of January, in the year of our Lord one thousand eight hundred and five, and of the Independence of the United States the 109th year.

EDWARD F. BISHOP, *Clerk,*
By F. W. TUPPER, *Deputy Clerk.*

[Seal of the United States circuit court, district of Colorado.]

Allowed by—
MOSES HALLETT, *Judge.*

49 *Return.*

THE UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In obedience to the command of the within writ I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand and the seal of said circuit court, at Denver, in said district, this 17th day of March, A. D. 1885.

EDWARD F. BISHOP, *Clerk.*

[Seal of the United States circuit court, district of Colorado.]

[Endorsed:] Gen. No. 1524. Circuit court of the United States. Joseph Reynolds & John D. Morrissey, plaintiff- in error, *vs.* The Iron Silver Mining Company. Writ of error to circuit court U. S., district of Colorado. Filed in circuit court of the U. S., this 13th day of Jan'y, A. D. 1885. Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. Morrison & Wenzell, & Patterson & Thomas, attorneys for pl'ffs in error.

50 & 51 *Citation.*

U. S. Supreme Court.

THE UNITED STATES OF AMERICA, *District of Colorado:*

The United States of America to the Iron Silver Mining Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Colorado, wherein Joseph Reynolds and John D. Morrisey are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Moses Hallett, judge of the circuit court of the United States for the district of Colorado, this 13th day of January, in the year of our Lord one thousand eight hundred and eighty-five.

MOSES HALLETT, *Judge.*

52 *Proof of Service.*

THE UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

On this 15th day of Jan'y, A. D. 1885, personally appeared E. A. Clark before me, the subscriber, a clerk of the circuit court of the United States for the district of Colorado, and makes oath that he delivered a true copy of the within citation to Hugh Butler, Esq., att'y for the Iron Silver Mining Company, def't in error, at his office in Denver, Colo.

E. A. CLARK.

Sworn to and subscribed before me, this 14th day of January, A. D. 1885.

[Seal of the United States circuit court, district of Colorado.]

EDWARD F. BISHOP, *Clerk,*
By CHAS. W. BISHOP, *Deputy Clerk.*

[Endorsed:] Gen. No. 1524. Circuit court of the United States, district of Colorado. Joseph Reynolds & John D. Morrisey, plaintiffs in error, *vs.* The Iron Silver Mining Company, defendant in er-

ror. Citation. Filed in circuit court of the U. S. this 14th day of Jan'y, A. D. 1885. Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. Morrison & Wenzell, & Patterson & Thomas, attorneys for pl'ff's in error.

53 And afterwards and on, to wit, the 14th day of January, A. D. 1885, came again the said defendants, by their attorneys aforesaid, and filed in said court and in said cause their bill of the exceptions reserved by them upon the trial of the issues herein; and also filed an assignment of errors herein.

And the said bill of exceptions is in words and figures as follows, to wit:

Bill of Exceptions.

UNITED STATES OF AMERICA, *District of Colorado*, } ss:

In the Circuit Court of the United States for the District of Colorado, Sitting at Denver.

THE IRON SILVER MINING COMPANY, Plaintiff, *vs.* JOSEPH REYNOLDS *et al.*, Defendants. } No. 1524.

Transcript of evidence on trial.

Be it remembered that on, to wit, the 17th day of November, A. D. 1884, the same being one of the regular juridical days
54 of the said court, the above cause coming on for trial before the court, the Honorable Moses Hallett, district judge, and a jury, the following proceedings were had, to wit:

The plaintiff, to sustain the issues on its part, introduced evidence as follows:

It first offered in evidence the United States patent to Thomas S. Wells and William Moyer for the Wells & Moyer placer.

The same was admitted (over defendants' general objection), and is hereto attached.

It then offered in evidence deed from Thomas S. Wells and William Moyer to *the* Stevens & Leiter for the patented ground in dispute.

Which was admitted under same objection as above.

Plaintiff then introduced in evidence deed of Stevens & Leiter to Iron Silver Mining Company.

Admitted as above.

To the introduction of which papers in evidence defendants' counsel duly objected.

But the court overruled said objection; to which ruling defendants duly excepted.

FREELAND, a witness produced, sworn, and examined on behalf of the plaintiff, testified as follows:

On direct examination:

I reside in Leadville; my business is mining and mechan-
55 ical engineering: am in the employ of the Iron Silver Mining Company as their mining engineer; am familiar with the ground described in U. S. patent to the Wells & Moyer placer (Exhibit —), and the ground contained in the plat (—); I know the distances to be about the same as they are represented there in that plat; I know the particular part of that ground where the defendants have worked on a vein underneath the surface in controversy in this case.

This line shaded green (indicating on plat —) represents the outline of the Wells & Moyer placer survey 281; the line here indicated by yellow, shading the larger, longer, and wider one, is the Pinnacle lode claim; the narrow and shorter one is the Crown Point mining claim; these claims shaded red belonging to some other mining company.

The point of the placer upon which the Pinnacle lode claim owners trespassed is there near this figure 32, right in the corner here, and that point is surrounded by a red square. This little square, represented by red lines, is shown on this smaller plat (——) enlarged, besides the various lines of the planes in that neighborhood, the working of the ground in that neighborhood.

This line (indicating on —) is the south side line of the Pinnacle lode claim, represented in this map by yellow shading; the
55 Pinnacle lode claim has also the same boundary lines with the Wells and Moyer placer, that is, partly so; this vertical line represents the east side line of the La Plata. The angle formed by those two lines lying south and east of the point of intersection, embraces a portion of the ground of the Wells & Moyer placer; this is the south side line and the south boundary, of course, of the Pinnacle lode, & this (indicating) is the east side line and east boundary of the La Plata lode; and this ground in between those two lines is a portion of the Wells & Moyer placer.

This drift shaded pink (——) and the winze marked with a cross, this drift shaded pink, marked 10429, and this stope marked A, B, C, also shaded in pink, represents workings made by the owners of the Crown Point and Pinnacle lodes, of which the last mentioned drift and stope, A, B, C, are within the drift partly, and the stope wholly, within the Wells & Moyer placer. The work represented here (——) by drift and winze—a short drift, colored gray—is work done by employes of the Iron Silver Mining Company; the drift shaded green is work done by the La Plata Mining Company.

Here counsel for plaintiff asked witness the following question:

Q. You may state the amount of ore taken out from the
57 Wells & Moyer placer claim by the defendants.

To which question, so asked, defendants, by counsel, objected, because supposing plaintiff's title to be all right and an ouster on our part, they cannot recover any damages based on the value of the ore, or anything more than nominal damages until a recovery of possession on their part.

2nd. Only a formal objection; the question is not confined to the date between our first ouster and the date when the suit was brought.

3d. That the question calls for an answer not based upon any knowledge presumably had by the witness as the facts now stand.

Which objection the court overruled and permitted the witness to answer the question.

To which action of the court in overruling said objection of defendants, defendants then and there duly excepted.

To which question of plaintiff witness made answer as follows:

A. I have not made a complete final estimate of the amount of ore taken, but I know from work that I have seen and assays taken there that there have been over 100 tons of valuable ore
58 taken, ore which would net over twenty dollars a ton. The gross value would be from two thousand dollars up. I could not tell exactly the value of the ore taken per ton, but I know it must be somewhat over $20.00 per ton—between twenty and thirty and forty, the net value. The gross value of the ore per ton would, on that basis, run from $30.00 a ton; say the net value of the ore was $20.00 a ton, gross value would not be over $30.00 a ton.

On cross-examination this witness stated:

I said my business was that of a mining and mechanical engineer; I am now in the employment of the Iron Silver Mining Company and the Surprise Company; I have been in the employ of the one or both of these companies since July, 1882; I am called their surveyor; am not their civil engineer, that part of my work is a branch of civil engineering; I call myself in their employ a mining engineer; do not wholly have charge of their underground workings, but my occupation as surveyor gives me an opportunity to become thoroughly familiar with all the workings of the property, and on that account it is part of my business to advise them as to what I know as to the direction the drifts should run and the working of the property in a general way, which suggestions of course are sometimes accepted and sometimes not. I am not the advis-
59 ing civil engineer. The defendants, I say, got over the Wells & Moyer line at a point just east of the Ora La Plata survey (indicating on map). On this larger map, the point where defendants are over that line is at a point very near the intersection of the east side line of the Ora La Plata lode and immediately southeast of the point of intersection of those two lines. This point, where they have broken into the Wells & Moyer ground, is about 430 feet underneath the surface—between 430 and 450. The work we have done there has been done through a shaft owned and worked by the La Plata Lode Mining Company in this neighborhood near the Ricketts shaft, through a level called the second level, running through a plane in a diagonal direction through this ground. There are other ways of coming on the same ground, through a tunnel called the La Plata tunnel; mouth of that tunnel is near the centre of this strip on that part of the La Plata claim; the mouth of this tunnel

is in the neighborhood of 1,200 feet from the point where the Crown Point people have got under the Wells & Moyer. There is another opening by which the same ground could be reached, called the Gleason shaft, on the La Plata lode. I am not competent to testify as to when these various workings of the La Plata were made. I know that certain of them did exist before the Iron Silver Mining Company did any work there. The tunnel spoken of is shown
60 on a level; it connects with an incline, a cross-cut or drift, and winze. The most convenient way for a man to get to this point of intersection, the point in dispute, is to go in the La Plata tunnel, then in the cross-cut, then down this line (indicating with pencil) in a winze, and then in a little short drift.

Here defendant asked:

Q. Now, are any of these workings by which you approach from the mouth of the La Plata tunnel to the point of intersection—are any of them what are called properly placer workings, or are they what are called lode mining workings?

To the asking of which question plaintiff objected, which objection the court sustained.

To which action of the court in sustaining said objection defendants duly excepted.

Witness continuing:

There are no openings on the Wells & Moyer placer by which you could get into this point where the breaking in has occurred, no openings on the surface of the placer. I can say that there has been trespass underneath the Wells & Moyer side line, from surveys and calculations made in the ordinary way. The way the survey was made and calculated was by locating a shaft on the Pinnacle claim, which I have called the east shaft—it is the deepest
61 one on the property, I believe—and a shaft on the Oro La Plata, which is called the Ricketts shaft, locating these shafts from surveys by means of the corners of the claims in question, and then connecting these points by underground surveys. Starting from the east shaft on the Crown Point you go down to about 280 feet, I think—my note book is here, I can give the figures—partly in solid rock, top in wash, then we go along a level drift to La Plata second level, and then a drift which is but six feet lower than this second level which I have mentioned; then along this second level which I have mentioned, called the La Plata second level, to the Ricketts shaft. The nearest point of opening at surface from the Wells and Moyer north line, by which we can get to the point of intersection or place of alleged trespass, I think, on this map, I believe to be the Ricketts shaft, on the Oro La Plata lode, (witness marks the same); it is right at the end of the La Plata tunnel. We have to go down that tunnel before we turn off on a side passage, somewhat over 300 feet I think. The formation at this point of trespass—the stopes were excavated in mineral lying in limestone; it is solid ground above and solid beneath; at the point in question they have not fol-

lowed on the lode, not to my knowledge; they are in limestone; what
defendants call a lode I would indicate as a crevice or fissure
62 of somewhat limited extent. I should say they are not following a vein or lode at this point. I should call it a pot hole or crevice in the limestone with mineral. I can trace that pot hole, I think, that particular one, for about 8 or 10 to 20 feet. I limit that pot hole at a point 10 or 20 feet from the Wells and Moyer placer line; for that space, 10 or 20 feet, defendants have followed in on the dip of what I call a pot hole. This crevice on which the stope was made is quite steep and does not extend very far to the east or west. It extends, probably, about 20 or 30 feet to the west, and at the point of intersection it would probably be about 15 feet north and south, or rather northeast, somewhat northeast. I have been through defendants' working- there, in the neighborhood of these workings; it is all in solid formation there. They were working in what I call crevice material; could not say how far that crevice material extends over on the ground of the Pinnacle; have never made any effort to trace it. I saw a number of workings and stopes; but very little crevice material left in these stopes, it seemed to be solid limestone. Most of the levels on the property seem to be driven either in porphyry or solid limestone, raising in the roof occasionally into stopes. I know of no drift that follows a crevice of mineral with that object in view.
There is no body of mineralized matter there extending
63 between the porphyry and limestone for several hundred feet, not to my knowledge, and there is no body of mineral that extends across the Pinnacle lode, not to my knowledge; there are no means of ascertaining such a fact. I could not say this deposit was the same in the Pinnacle and Wells & Moyer and Crown Point. I know of no workings which would show such formation; this pothole had a steep pitch towards the east, generally speaking, where it crossed the side line of the placer; this crevice is of such extremely irregular shape at that point it has not an average; it varies all the way from nothing to 90°, running up in various directions; well, the dip of it is up all the way from plus 90, and then all the way through the minus quantities to zero again. I examined these; some went one way and some another. I saw four or five points where defendants have crossed our line. At one stope that is now visible, the waste having been taken out of the stope, a portion of the stope has a hanging wall; we can get at that. I haven't the data for stating the incline or fall from the bottom of the Ricketts shaft to the point of trespass. The working that connects the bottom of the Ricketts shaft with the place in dispute is the second level; there are four or five levels. I said the Ricketts shaft was 300
feet and over. And the workings mentioned strike the point
64 of trespass at the depth of 4,430 feet; the inclination from the bottom of the Ricketts shaft to point of trespass is 130 feet or less; well, I would not be very particular in regard to this difference in elevation—130 feet. You must know that the collar of the Ricketts shaft has a very different level than at the surface at the point in dispute. The surface of the ground at the Crown Point and Pin-

nacle shafts is also at a very different level from the surface of the ground in dispute; by this map (——) it seems to be somewhere near or in the neighborhood of 100 feet—100 feet difference in level between the collar of one of these shafts and the surface of the ground at point in dispute.

The depths of the shafts Crown Point and Pinnacle are one 130 and the other 280 feet and something. The depth of the east shaft is 280 feet and something. The bottom of east shaft is below the third level; that would give a negative dip of perhaps 30° difference (between that and point of trespass) to the west. The bottom of the east shaft must be in the neighborhood of 100 or 150 feet lower than the point where the trespass occurred. I have seen some of the ore that was taken out; it is a black and red, rather light ore, containing not a great deal of lead, but considerable silver; it belongs to the carbonate class of ores. The ore is such as is generally found in lode claims; sometimes found in placer shafts, but placer shafts
65 would not be made for that kind of ore.

On redirect-examination witness states:

These underground workings of the Crown Point and Pinnacle that Mr. Morrison has called my attention to do not follow a vein or lode on the contact; they are excavated mostly in porphyry rock above the contact, if one exists there, with a contact vein or in crevices, and not holes, and solid limestone below. There are no series of workings from the ground Mr. Morrison has examined me regarding, which in their nature, or from their examination by me, could show any continuous vein, if one exists in that neighborhood. There are no workings there that could be called, in common parlance, tracings—that is, workings that seem to have for their object to show a continuous vein or the dip or strike of a vein. I have here testified that where the workings got across the vertical boundary lines of the placer they are down in crevices and potholes in the solid limestone. I have examined almost all of the workings of the Crown Point and Pinnacle that were accessible at the time of my various visits. To my certain knowledge there is not, underneath the surface of the Pinnacle or Crown Point, any such working as would enable any one to determine whether or not there is any continuous vein of any kind or whether it has any particular strike or dip.

The patent heretofore referred to is in words and figures following, to wit:

66 *Patent.*

Book J, Page 614, Doc. 1537.

United States to Thomas S. Wells *et al.*

General Land Office No. 3098. Mineral Certificate No. 155.

The United States of America to all whom these presents shall come, Greeting:

Whereas in pursuance of the provisions of the Revised Statutes of

the United States, chapter six, title thirty-two, there have been deposited in the General Land Office of the United States the plat and field-notes of survey of the placer mining claim of Thomas S. Wells and Wm. Moyer, accompanied by the certificates of the register of the land office at Fairplay, in the State of Colorado, whereby it appears that in pursuance of the said Revised Statutes of the United States the said Thomas S. Wells — Wm. Moyer did, on the twenty-second day of July, A. D. 1878, enter and pay for said claim or premises, being mineral entry No. 155 in the series of said office, designated by the Surveyor General as lot No. 281, embracing a portion of the unsurveyed public domain in the California Mining District, in the county of Lake and State of Colorado, in the district of lands
67 subject to sale at Fairplay, containing one hundred and ninety-three (193) acres and forty-three hundredths ($\frac{43}{100}$) of an acre of land, more or less, and according to the returns on file in the General Land Office bounded, described, and platted as follows, with magnetic variation at fifteen (15) degrees east, to wit:
68 Beginning at corner No. 1, a porphyry rock 5x6x9 inches in size, marked "1—281," from which U. S. locating monument No. 1 bears north seventy-three (73) degrees one (1) minute and thirty-six (36) seconds west at the distance of ten thousand eight hundred and seventy and sixty-three hundredths ($10{,}870\frac{63}{100}$) feet, and the peak of Bald Mountain bears south sixty-five (65) degrees thirty-five (35) minutes east; thence from said corner No. 1 south seventy-nine (79) degrees twenty-eight (28) minutes east five hundred and ninety and five-tenths ($590\frac{5}{10}$) feet to corner No. 2, a porphyry rock 5x7x12 inches in size, marked "2—281;" thence south fifty-eight (58) degrees eight (8) miuntes east four hundred and thirty-six (436) feet to road, seven hundred and twenty-one (721) feet to corner No. 3, a granite rock 5x7x13 inches in size, marked "3—281;" thence south twenty-five (25) degrees four (4) minutes west sixty-eight (68) feet to corner No. 4, a granite rock 7x8x8 inches in size, marked "4—281;" thence south sixty-six (66) degrees eight (8) minutes east seven hundred and thirty-eight (738) feet to corner No. 5, a granite rock 7x11x13 inches in size, marked "5—281;" thence south twenty-nine (29) degrees forty-eight (48) minutes west twenty (20) feet to north bank of California Gulch, fifty-six (56) feet to stream, ninety (90) feet to south bank of California Gulch, one hundred and thirty-three (133) feet to corner No. 6, a quartz rock 8x11x12 inches in size, marked "6—281;"
69 thence north seventy-two (72) degrees fifty (50) minutes west two hundred and fifty (250) feet to corner No. 7, a quartz rock 6x8x12 inches in size, marked "7—281;" thence south twenty (20) degrees forty-eight (48) minutes west two hundred and forty (240) feet to north bank of Eureka Gulch, five hundred and fifty (550) feet to south bank of said gulch, eight hundred and forty-five (845) feet to corner No. 8, a porphyry rock 7x9x12 inches in size, marked "8—281;" thence south seventy-two (72) degrees eight (8) minutes west two hundred (200) feet to corner No. 9, a porphyry rock 5x7x10 inches in size, marked "9—281;" thence south four hundred (400) feet to corner No. 10, a quartz rock 5x6x10 inches

in size, marked "10—281," from which a blazed pine tree thirteen (13) inches in diameter bears north thirty-two (32) degrees ten (10) minutes east at a distance of eight and three-tenths ($8\frac{3}{10}$) feet, and a pine fourteen (14) inches in diameter, blazed, and marked "10—281," bears south seventy-one (71) degrees thirty-eight (38) minutes east at the distance of ten (10) feet; thence from said corner No. 10 south thirty-nine (39) degrees fifty-six (56) minutes west seven hundred and fifty (750) feet to corner No. 11, a quartz rock 4x8x11 inches in size, marked "11—281," from which a pine tree sixteen (16) inches in diameter, blazed, and marked "11—281," bears north sixty-two (62) degrees twelve (12) minutes east at the distance of twelve (12) feet, and a pine tree nine (9) inches in diameter, blazed, and marked "11—281," bears south fifteen (15) degrees twenty-one (21)
70 minutes east at the distance of ten and eight-tenths (10.8) feet; thence from said corner No. 11 west one hundred and twenty-eight and seventy-one hundredths (128.71) feet to corner No. 12, a granite rock 5x7x11 inches in size, marked "12—281," from which a pine tree thirteen (13) inches in diameter, blazed, and marked "12—281," bears south five (5) degrees thirteen (13) minutes east at the distance of sixteen and two-tenths (16.2) feet, and a pine tree eleven (11) inches in diameter, blazed, and marked "12—281," bears south fifty-nine (59) degrees eight (8) minutes west at the distance of fourteen and eight-tenths (14.8) feet; thence from said corner No. 12 south eleven hundred and sixty-four and one-tenth (1,164.1) feet to corner No. 13, a granite rock 5x11x14 inches in size, from which Mt. Sheridan bears south seventy-three (73) degrees thirty-six (36) minutes east, monument on Mt. Elbert bears south fifty-four (54) degrees forty-six (46) minutes west, a pine tree nine (9) inches in diameter, blazed and marked "13—281," bears south twenty-four (24) degrees eight (8) minutes west at the distance of ten and five-tenths (10.5) feet, and a pine tree five (5) inches in diameter, blazed, and marked, bears north seventy-seven (77) degrees forty-seven (47) minutes west at the distance of thirteen (13) feet; thence from said corner No. 13 west thirty-five hundred and ninety-four and sixteen hundredths (3,594.16) feet to corner No. 14, a granite rock
71 5x10x14 inches in size, marked "14—281," from which a pine tree eleven (11) inches in diameter, blazed, and marked "14—281," bears north twenty-nine (29) degrees twenty-two (22) minutes east at the distance of eleven and two-tenths (11.2) feet, and a blazed pine tree twelve (12) inches in diameter, marked "14—281," bears north seventy-one (71) degrees twenty-five (25) minutes west at the distance of thirty-one (31) feet; thence from said corner No. 14 north twenty-six (26) minutes west eleven hundred and thirty-eight and sixty-nine hundredths (1,138.69) feet to corner No. 15, a quartz rock 5x7x9 inches in size, marked "15—218," from which a blazed pine tree seventeen (17) inches in diameter bears north sixty-five (65) degrees fifteen (15) minutes west at the distance of eleven and one-tenth (11.1) feet, a double pine tree, blazed, and marked "15—281," bears south nineteen (19) degrees ten (10) minutes east at the distance of ten (10) feet; thence from said corner No. 15 east five hundred and ninety (590) feet to corner No. 16, a porphyry rock 7x8x11

inches in size, marked "16—281," the same being corner No. 3 of survey No. 236; thence north sixty-five (65) degrees fifteen (15) minutes east along the southerly boundary of said survey No. 236 five hundred and twenty-seven (527) feet to corner No. 17, a porphyry rock 5x12x12 inches in size, marked "17—281," the same being corner No. 1 of survey No. 259; thence south fifty (50) degrees east four hundred and seventy-two and forty-seven hundredths
72 (472.47) feet to corner No. 18, a granite rock 3x8x14 inches in size, marked "18—281," the same being corner No. 2 of said survey No. 259; thence north sixty-five (65) degrees east five hundred and thirty-one and twenty-nine hundredths (531.29) feet to corner No. 19, a granite rock 5x5x15 inches in size, marked 19—281; thence south one hundred and ninety (190) feet along the west boundary of the Oro La Plata lode to corner No. 20, a granite rock 6x6x18 inches in size, marked "20—281," from which a blazed pine tree seven (7) inches in diameter bears north nineteen (19) degrees thirty (30) minutes east at the distance of five and five-tenths (5.5) feet, and a blazed pine tree twelve (12) inches in diameter bears south eighty (80) degrees thirty (30) minutes west at the distance of nineteen (19) feet; thence from said corner No. 20 east along the south boundary of said Oro La Plata lode three hundred (300) feet to corner No. 21, a granite rock 6x7x10 inches in size, marked "21—281," from which a blazed pine tree fourteen (14) inches in diameter bears north seventy-two (72) degrees six (6) minutes east at the distance of twenty-one and one-tenth (21.1) feet, and a blazed pine six (6) inches in diameter bears north thirty-five (35) degrees thirty-three (33) minutes east at the distance of twelve and eight-tenths (12.8) feet; thence from said corner No. 21 north along the east boundary of said Oro La Plata lode three hundred and twenty-
73 nine and eighty-nine hundredths (329.89) feet to corner No. 22, a quartz rock 6x6x9 inches in size, marked "22—281;" thence north sixty-five (65) degrees east one hundred and fifty-two and seven-tenths (152.7) feet to corner No. 23, a lime rock marked "23—281," the same being corner No. 3 of said survey No. 259, from which a blazed pine tree fourteen (14) inches in diameter bears south seventy-two (72) degrees four (4) minutes east at the distance of eleven and eight-tenths (11.8) feet and a blazed pine tree ten (10) inches in diameter bears north sixteen (16) degrees thirty (30) minutes east at the distance of twenty-six (26) feet; thence from said corner No. 23 south fifty (50) degrees east eight and sixty-six hundredths (8.66) feet to corner No. 24, a granite rock marked "24—281," the same being cor. No. 4 of said survey No. 259, from which a blazed pine tree thirteen (13) inches in diameter bears north one (1) degree twelve (12) minutes east at the distance of thirty and seven-tenths (30.7) feet; thence from said corner No. 24 north sixty-five (65) degrees fifteen (15) minutes east three hundred (300) feet to corner No. 25, a granite rock marked "25—281," the same being corner No. 5 of said survey No. 259, from which a blazed pine tree eighteen (18) inches in diameter bears north eighty-nine (89) degrees twenty (20) minutes west at the distance of twelve and five-tenths (12.5)

feet, and a blazed pine tree ten (10) inches in diameter bears
74 south at the distance of four (4) feet; thence from said corner No. 25 north fifty (50) degrees west three hundred and ten (310) feet to corner No. 26, granite rock 5x9x12 inches in size, marked "26—281," the same being corner No. 6 of said survey No. 259, from which a blazed pine tree sixteen (16) inches in diameter bears south ten (10) degrees thirty-one (31) minutes west at the distance of thirty-three (33) feet, and a blazed pine tree eighteen (18) inches in diameter bears south forty-five (45) degrees forty-two (42) minutes west at the distance of fifteen and two-tenths (15.2) feet; thence from said corner No. 26 south sixty-five (65) degrees west one hundred and ninety-eight and fifty-two hundredths (198.52) feet to corner No. 27, a granite rock, 7x9x11 inches in size, marked "27—281," from which a blazed pine tree fourteen (14) inches in diameter bears north nineteen (19) degrees fifty (50) minutes east at the distance of six (6) feet, a blazed pine tree tree twelve (12) inches in diameter bears north seventy-two (72) degrees twenty-four (24) minutes west at the distance of twenty-seven and five-tenths (27.5) feet; thence from said corner No. 27 north four hundred and nine and eighty-five hundredths (409.85) feet to corner No. 28, a porphyry rock 6x8x16 inches in size, marked "28—281," the same being corner No. 3 of survey No. 278, from which a blazed pine tree fourteen
75 (14) inches in diameter bears north thirteen (13) degrees forty-six (46) minutes west at the distance of twenty-nine and eight-tenths (29.8) feet, and a blazed pine tree sixteen (16) inches in diameter bears south fifty-eight (58) degrees twenty-seven (27) minutes east at the distance of eighteen (18) feet; thence from said corner No. 28 south forty (40) degrees east fifteen hundred (1,500) feet to corner No. 29, the same being corner No. 4 of said survey No. 278, from which a blazed pine tree sixteen (16) inches in diameter bears south seventy-one (71) degrees thirty-two (32) minutes west at the distance of nineteen and three-tenths (19.3) feet, and a blazed pine tree sixteen (16) inches in diameter bears north twenty-two (22) degrees twenty-five (25) minutes east at the distance of five and seven-tenths (5.7) feet; thence from said corner No. 29 north four hundred and sixty-six and five-tenths (466.5) feet to corner No. 30, a porphyry rock 4x8x14 inches in size, marked "30—281," the same being corner No. 5 of said survey No. 278 from which a blazed pine tree twenty (20) inches in diameter bears north eighty-seven (87) degrees twenty-five (25) minutes west at the distance of seventeen and seven-tenths (17.7) feet, and a blazed pine tree twelve (12) inches in diameter bears north fifty (50) degrees ten (10) minutes east at the distance of twenty-nine (29) feet; thence from said corner No. 30 north forty (40) degrees west eight hundred and fifty-two
76 and sixty-five hundredths (852.65) feet to corner No. 31, a porphyry rock 8x8x12 inches in size, marked "31—281," from which a blazed pine tree eleven (11) inches in diameter bears north fifty-seven (57) degrees thirty-one (31) minutes east at the distance of seventeen (17) feet, and a blazed pine tree fourteen (14) inches in diameter bears north forty-two (42) degrees sixteen (16) minutes west at the distance of twelve and two-tenths (12.2) feet;

Survey No. 281.

Plat of the Placer Claim of

Thomas S Wells & Wm Moyer

California Mining District

Lake County

Colorado

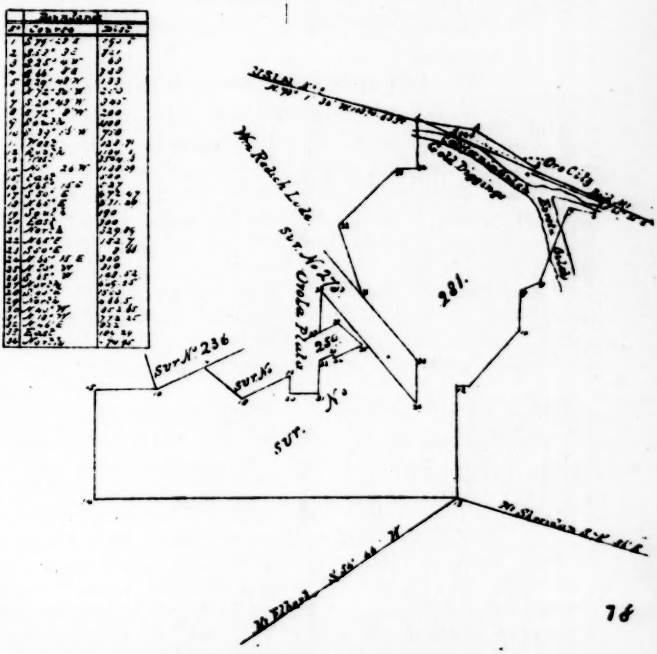
No 13014.
Reynolds et al
vs
Iron Silver
Mining Co.

p 78

Containing 19 3/10 Acres

Scale 400 ft to an inch

Var 15° E.



78

thence from said corner No. 31 north eighteen (18) degrees west, seven hundred and seventy-two and twenty-five hundredths (772.25) feet to corner No. 32, a porphyry rock 7x8x15 inches in size, marked "32—281;" thence north forty-six (46) degrees east eight hundred and twenty-two (822) feet to corner No. 33, a porphyry rock 3x6x18 inches in size, marked (33—281); thence east one hundred and eighty-nine and twenty-nine hundredths (189.29) feet to corner No. 34, a porphyry rock 3x4x8 inches in size, marked "34—281," from which a blazed pine tree eighteen (18) inches in diameter bears north thirty-three (33) degrees thirty (30) minutes east at the distance of four (4) feet; thence from said corner No. 34 north three hundred and twenty-four and ninety-five hundredths (324.95) feet to south bank of California Gulch, three hundred and seventy-four and ninety-five hundredths (374.95) feet to stream in said gulch, four hundred and nine and ninety-five hundredths
77 (409.95) feet to north bank of said gulch, four hundred and sixty-four and ninety-five hundredths (464.95) feet to county road, four hundred and seventy-four and ninety-five hundredths (474.95) feet to the place of beginning, containing one hundred and ninety-three (193) acres and forty-three hundredths ($\frac{43}{100}$) of an acre of land, more or less, as represented by yellow shading in the following plat.

(Here follows diagram marked p. 78.)

79 Now know ye, that the United States of America, in consideration of the premises and in conformity with said Revised Statutes of the United States, have given and granted, and by these presents do give and grant, unto the said Thomas S. Wells and Wm. Moyer, and to their heirs and assigns, the said placer mining premises above described as lot No. 281, embracing a portion of the unsurveyed public domain, to have and to hold said mining premises, together with all the rights and privileges, immunities, and appurtenances of whatsoever nature *soever* thereunto belonging, unto the said Thomas S. Wells and Wm. Moyer, and to their heirs and assigns forever, subject nevertheless to the following conditions and stipulations:

First. That the grant hereby made is restricted in its exterior limits to the boundaries of the said lots No. 281, as hereinbefore described, and to any veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits which may hereafter be discovered within said limits, and which are not claimed or known to exist at the date hereof.

Second. That should any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits be claimed or known to exist within the above-
80 described premises at the date hereof, the same is expressly excepted and excluded from these presents.

Third. That the premises hereby conveyed may be entered by the proprietors of any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, for the purpose of extracting and removing the ore

from such vein, lode, or deposit, should the same or any part thereof be found to penetrate, intersect, pass through, or dip into the mining ground or premises hereby granted.

Fourth. That the premises hereby conveyed shall be held subject to any vested and accrued water-rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water-rights, as may be recognized and acknowledged by the local laws, customs, and decisions of courts.

Fifth. That in the absence of necessary legislation by Congress, the Legislature of Colorado may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to the complete development thereof.

In testimony whereof, I, Rutherford B. Hays, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

81 Given under my hand at the city of Washington, the eleventh day of March, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the one hundred and third.

[Seal U. S. Gen'l Land Office.]

By the President: R. B. HAYES.
By WM. H. CROOK, *Secretary.*
S. W. CLARK,
Recorder of the General Land Office.

Recorded vol. 38, pages 275 to 286, inclusive. Examined.
Recorded March 27th, A. D. 1879, at 10 o'clock a. m.
JAS. H. WELLS, *Recorder.*
E. T. WOLVERTON, *Deputy.*

STATE OF COLORADO, }
County of Lake, } *ss:*

I, F. M. Reardon, clerk and recorder in and for said county, in the State aforesaid, do hereby certify that the within and foregoing is a true and correct copy of patent, Wells and Moyer placer, No. 1537, as appears of record in my office, in Book J, page 614.

Witness my hand and official seal, this 7th day of October, A. D. 1884.

[SEAL LAKE COUNTY, COLO.] (S'g'd) F. M. REARDON,
Clerk and Recorder.
H. M. BURRELL,
Deputy.

82 The plaintiff thereupon rested, and thereupon the defendants introduced evidence in support of their case, as follows:

W. B. PAGE, produced and sworn, testified as follow-:

I reside at Leadville; am a civil and mining engineer; have fol-

lowed that occupation about 13 years; was educated in Virginia, then in Kentucky and Colorado; about six years in Colorado, during which I have been pretty busily engaged in the business of my profession, and also in Kentucky, on the State geological survey; was at work on that survey about 3 years before coming to Leadville; during my residence in Colorado I lived at Leadville all the time, except when I was employed in other parts of the State; during this six years my experience has been quite extensive, including Georgetown, in a northerly direction, and Silverton, in a southerly, but principally in Leadville and through that country; have had frequent occasion *and* to examine and make inspection of the deposits in what is known as Rock and Iron Hills; the two hills are north and south of each other, about the same height, separated from each other by California Gulch, as shown on one of the maps here; upon the north side of the gulch is Iron Hill and on the south side is Rock Hill. I know the claim called Wells & Moyer placer claim, in California Mining District, and also
83 its position and boundaries, at least for the most part from California Gulch southward, including the crest of Rock Hill, as shown on the topographical map, extending from California Gulch over and across the hill nearly to Iowa Gulch; in other words, keeping on the crest of Rock Hill as shown on the map. I am acquainted with the Wells and Moyer and its boundary lines and location, and I have made survey of the same; it was made in the office, in connection with myself, under my supervision; have at various times made examinations of the workings of what is known as the Crown Point and Pinnacle claim; for some time previous the firm of Page and Blow have been the engineers on the Pinnacle and Crown Point—for over two years—of which firm I am the senior member, and I have very extensively examined the character of the mineral deposits, &c.

This map (Exhibit A) was made in the office of myself and Mr. Miller, Mr. Blow of the firm having then left, he being at one time during the surveys engaged in making some of the work. The upper part of the left-hand map as shown here is a plain horizontal map of the Pinnacle and Crown Point, showing the boundaries of these claims, and in connection with it the underground workings. The Pinnacle is shown colored red and the Crown Point is colored blue. The colors of the map indicate the different levels and different depths from the surface of the ground. This section
84 map, Exhibit B, is a map at right angles to the horizontal map or one vertical, showing the ground vertically through towards the centre of the earth, the surveys being indicated from actual instrumental work, as shown. The next from the surface is the wash and porphyry, and next porphyry in place, with limestone underneath, and vein between porphyry and limestone. The several shaded lines represent the depth from the surface, being the first, second, and third levels as they appear, and their relation. The scale of this map is the same one as the other, and it should be placed at right angles to the other to be properly represented.

The next map, Exhibit C, on top to the right is a topographical

map, which represents the Pinnacle and Crown Point, colored red, and the Wells and Moyer, and the relation between the two and other lode claims surrounding the Wells and Moyer. In addition to that it represents the topography or the irregularity of the surface, the contour lines being ten feet apart, and showing the shape of the hill; for instance, there are thirty-seven contour lines from here to Iowa Gulch, and about the same number on that hill, which indicates that this hill is three hundred and seventy feet higher than California Gulch and Iowa Gulch.

This lower map, Exhibit D, is a map taken with a camera, sketching the shape of the hill; it shows, in addition to the topographical map, the appearance of this hill from the opposite hill on
85 about a level with Wells and Moyer Hill, and the Rock Hill showing these veins as taken on Iron Hill, this showing the slope of the hill to be the westward, and this particular point and these points (indicated) being the several shafts. These are the Wells and Moyer shafts. The course of the lode, including the Wells and Moyer, is shown by the yellow lines, and the mountains appear down the Arkansas, still in the background. The foreground of this camera sketch is California Gulch. Looking this way you see the course of this hill here, as shown by the shaded line. It has several dumps, this shaded one being the rock dump down in this direction.

On the plain map, the horizontal map, the Crown Point bears the relation to the Pinnacle as shown here, the exterior lines; but the dotted lines, the Oro La Plata, cut out so much of the Crown Point as is shown by the blue and dotted lines. The Pinnacle is represented on this map, and the Oro La Plata, and their relations to each other and its relation to the other two; and the workings are shown in the plans here and also in the section here. Commencing on the upper part of this map at the left hand portion we find shafts sunk there to the depth of about one hundred feet; this one being entirely in wash or gravel and boulders down to the limestone, and that shaft is shown in plan at that point; on the section map as made they are at right angles, as indicated by the red lines; there
86 is the first level entering Wells and Moyer at this section and in this end of the plain map.

The second shaft, which is the discovery shaft of the Pinnacle, is about the depth of this shaft, and is excavated through the wash, through rock in place. As met in the shaft it is porphyry, as shown here, only for a few feet, and then reaching the veins, and then going down into the limestone ten or fifteen or twenty feet. This is the discovery shaft in the Pinnacle. From that shaft at the bottom is extended a level to about this point, 30 or 40 feet from the discovery shaft, and then inclining following the vein, and this level continues until it reaches shaft No. 1, shown here. In that distance the vein has the appearance of that (indicated), and is shown by the drifts running through it as to its actual thickness and thinness and its dip, and as though you were looking at it from the south to the north.

Shaft No. 1, now reaching the vein at that depth through the wash,

through rock in place, down in the limestone, is still going down deeper in the limestone. At this point the work goes down eastward, and cuts the vein at that point, and it is still going down eastward. The working shaft is sunk at that point and still going down, being sunk in the section, passing down through porphyry in place, through the vein and limestone beneath.

87 That is a shaft referred to by Mr. Morrison and Freeman as the east shaft on the Pinnacle and Crown Point claims, used for the purpose of working and hoisting ore. It is about 160 feet down, sunk in this section, and a drift is run westward, and is here (indicated) stoped to the north and turning due west, but intended finally to reach this point. There in that level the limestone is laying or dipping in a contrary direction at about 15 degrees, as we have indicated by the dead lines, which include that, too. The limestone has been tilted up about 15 degrees, which was at one time horizontal, but is now at an angle of fifteen degrees with the horizontal. I say this level, being run to the eastward, gets deeper into the limestone, and upraises have been made at this point and that point, crossing the levels in this direction. The levels run and the upraises made show the vein about as indicated here, as to its thickness and size, in that line of section. From the working shaft to the eastward have been run other levels—the first level in this direction, a level having the vein almost its entire length; a second level further down to the limestone for working purposes, so that through that the ore might be brought and handled economically. Here a third level runs off almost entirely through the limestone, reaching the vein at its several points, and here the vein ma-

88 terial that is above it can be handled most economically and taken out. At the end of the third level, at this point as indicated in the section, are winzes or vertical shafts, and they are prospected through to the limestone; now, without being in the limestone at the beginning, they reach these several points, and show the contact of the vein between porphyry and limestone.

Over to the north from this section at ten or fifteen feet that section should have been changed to represent properly a large, thick vein there of about that size. In other words, that section instead of running into the Wells and Moyer would have been drawn there (indicated) through that level to the northward about twenty feet. This vein I should say from the apex or top begins at the wash, and it has an incline from the surface to the limestone of about fifteen degrees. There are several irregularities from that dip, but it has about 15 degrees, as shown by this section, that being flatter at one point and flatter at another point and steeper at two or three points makes its total dip about fifteen degrees at its eastern portion through the side lines of the Pinnacle and into the Well and Moyer placer claim. This here would be a steep pitch of the vein and this a flat pitch, and the sum of the two pitches would be about fifteen degrees; this is very irregular, extending both north and

89 south, so that in a section drawn through here the slope would have another inclination from that. At different sections it would have different slopes; but this represents not only the average

dip of the vein, but its average thickness and direction and changes of direction, it being as much as seven feet here and as little as six inches to a foot in other places.

Now, near here are the Dome workings which is an adjoining claim on this side, and levels have been run doubtless for ore across the ground from this working, which shows this working is on a continuation of the vein from here—a short distance from this point to within a short distance of that point, (indicated); in other words, that is additional evidence of the continuity of the vein, the only question then being as to how thick or thin the vein is between the points undeveloped, and it may vary, as this vein is shown to vary here, from a number of feet to a half inch.

In this working in dispute I found porphyry as a hanging wall and limestone as a foot wall. I found the top or apex or the high end of the vein as it reaches the rock in place going to the eastward and disappearing on going into the east and going to the westward, indicated here by the red line, that is shown more particularly by the discovery working running in that direction, as is
90 shown also by the section, showing that the apex of the vein is at such a point, as indicated here, and to a few feet to the west of the discovery shaft, and on the claim to a distance shown, crossing through the two lines, crossing the north and south side lines of the Crown Point and the west end line of the Crown Point, as indicated by the red line.

In regard to the continuity of the vein, the vein is visible as indicated here. These levels or drifts are about six feet high and four or five feet wide, and for the most part of the way through them the vein can be seen, the thickness can be measured as shown in this section, and in addition to this assays have shown that it has an appreciable value in connection with it, it being either one foot thick or sixty. The strike of the vein, as indicated by this working and the workings on both sides, is *it* north and south. The level runs through the vein, being a line having this direction; the dip of the vein at right angles to that is eastward, and almost due east, at fifteen degrees from the horizontal, as shown by the section in this direction; the south being in this direction on the plan and north in this direction, the top of the vein being here.

If he were to draw two lines, extended in their own direction, from two points where the outcrop leaves the Crown Point claim down towards the alleged point of trespass, the would, as
91 near as can be stated, include that point of ground. A drop in the vein from the working or east shaft down to the lowest point that has been reached is about a hundred and ten feet; the distance is about five hundred feet; in other words, the dip, as indicated there, taking it as a whole, is about fifteen degrees, the vein making, by actual measurement, this dip, being a flat pitch, a steep pitch, and so forth. The dip of it, being measured approximately, as I place the pointer in connection with that line, being a horizontal line, the course of the vein and its appearance appears to be the same where it crosses the Wells and Moyer line as it is to the west of that line. You may expect the vein to fall down a little

after the steeper pitches, if you may judge from the section and exactly shown by the development, and these correspond to every steep pitch; after almost every one there is a flat one, the whole going to make the dip about fifteen degrees. These blue lines were once horizontal, but have been tilted up at an angle of fifteen degrees, and the vein is between the limestone and porphyry. I would call that a contact-fissure vein. A contact vein occurs between two dissimilar rocks. A fissure vein is what I believe to be a vein originated by a *coming* after both the limestone and porphyry *is* deposited. The approximate elevation of the surface from the point of the alleged surface above the level of California Gulch
92 in the immediate vicinity of the ground is shown by the con*course*, thirty in number, to be three hundred feet. The distance between the two points, the bottom of California Gulch and the point of trespass at the surface, I should say, roughly, was about eighteen hundred feet, so that the rise of the mountain here from the gulch is quite abrupt, decidedly abrupt, as shown by these contours by actual measurement.

I have known these properties for six years. From my actual knowledge of it at that time I should say it was pretty heavily covered with timber.

As to the approximate depth of the wash and slide there, it varies from a few inches to eight feet, thirty feet, and lower down the hill ninety to a hundred feet, and a little over one hundred feet as shown in this section. This delineation shown here shows approximately the relation of the wash to the limestone and porphyry in place, and this at the westerly end being deeper than at any other point. In addition to that the rock in place can be reached at, I know, eight five, and six feet, and in other places the porphyry with outcrop, through the wash, and there will be no appreciable depth to the wash, and then it varies from that to one hundred feet and over in this immediate neighborhood.

California Gulch has been worked by placer shafts, and so has Iowa Gulch, they taking out, as a result of that gold, of cer-
93 tain fineness, the fineness meaning principally the amount of silver with the gold, a very small quantity of silver being taken out with a large quantity of gold. Higher up in the hill I know of no such workings, or to a very limited extent, the gravel, which is of a very limited depth, being worked and taken and used as placer ground in both of these gulches, Iowa and California. The rock found between the porphyry and limestone is a silver-bearing rock, that being found particularly in connection with lead and iron. The average width of California Gulch proper, that part embraced in the Wells and Moyer placer, is twenty to thirty feet, but the gulch embraces as high as two hundred and fifty feet by going to the limits. The extreme length of the Wells and Moyer placer, through the gulch across to the north and south, is the distance nearly between the gulches. Three thousand feet across is the average width of California Gulch to the end of the Wells and Moyer placer, or three-fifths of a mile after leaving the gulches proper on the plain. I do not think the wash or debris or loose material could be considered

properly as consisting of the gravel that is used even in connection with placer deposits.

Soon after reaching the camp in the winter of 1878 I went into the mines around and above Leadville. It was my first experience with the existence and extent of these lode claims, and de-
94 posits on the Crown Point and Pinnacle and Oro La Plata, and in that immediate vicinity. I first went into the Crown Point and Pinnacle, as near as I can place it, about eighteen months ago. I went into the Crown Point under two managers; do not know exactly when the property changed hands, but I know that when I first went in there was eighteen months or two years ago. As to the Oro La Plata, it was very much earlier than that; soon after I came into the camp; about the summer of 1878. At the time of the first visit I speak of to the Oro La Plata I saw there was a vein — mineral, between porphyry and limestone, of varying thickness, extending in a northerly and southerly direction, as shown by the La Plata, on the strike of the vein in connection with the developments on the Crown Point. The strike of the vein, as I have said, would be north and south, and a level or drift being run from the La Plata proves this, that the various levels and workings on the Crown Point and Pinnacle—that to reach it the vein must have this approximate shape, the dip of that vein to the eastward and the strike to the north and south, as shown by the workings, towards the Wells and Moyer placer.

The Crown Point, Pinnacle, Oro La Plata, Dome Rock, Seventy-Six, H. D., Stone, and all the earlier claims, William Reddick, Golden Age, Pennsylvania, Vermont, Emma, Nisi Prius, Lead-
95 ville, Sequin, and some others were the claims, according to my recollection, which were there in 1878. These are only those that are partially or wholly within the boundaries of the placer claim. I found these claims on all sides of the placer in a circle surrounding the Wells and Moyer, here one and there another, including the claims already stated, beginning with the Stone, Rock, Dome, Crown Point, Pinnacle, La Plata, H. D., Leadville, Nisi Prius. So far as I know these included the lode, and are located upon this vein, extending north and south on the strike of the lode now and going eastward on the dip. The developments are now sufficient to show the dip and its extent in every direction. The Leadville and Nisi Prius had got on the Wells and Moyer claim, and cut it directly in two in connection with the Crown Point. The line of the Leadville comes at one point on the Wells and Moyer on the north side, and the width of the Leadville being nothing there, but widening at this point here, it takes in the width of the Wells and Moyer ground, this being limited from the north point to the south.

Cross-examination by Mr. SYMES:

The lines from which this section map are drawn are indicated by the letters A, B, C, D, E, F, G, H, and I, and also by the small letters a, b, c, d, e, f, g, h, and i, the sectional line is repre-
96 sentee by the horizontal map seen straight. The sectional map is represented by a second map, and that is necessarily

straight, as the paper is straight. The Oro La Plata is about north and south. The section line itself runs north and south, and then it runs across the Pinnacle and Oro La Plata at an angle of forty-five degrees, but not ninety degrees. On this section line there are workings that justify the marking of that vein there from actual measurements and tracing it from the shaft pretty near to the working shaft on the second map. There is a drift there that is underground about thirty feet, and is still going down on a vein. I have spoken of the workings on the Rock and Dome. They develop the same vein, coming in between, just in that gap on the workings here. The workings on the Dome, where I have spoken of them, come into the Crown Point. They come directly between in a direct line from the easterly extent to the westerly working, and between that and the westerly extent of the easterly working, and prove the continuity of the vein. They are on the section line on that map. The workings come down from that outcrop, extending in this direction, and they dip as these workings, for, and in addition to that, they go to the southward, following the same vein, and follow between here (indicated), so that the workings are as indicated roughly in pencil,

97 a level running that way, and inclined to reach the level far enough underground, the same way as it shows here (indicated with pencil). This working covers at least half of the gap existing between these others. I did not put these workings on this map because I had not access to survey them. We had access to the Crown Point for so many days, but it was almost impossible to make a map of these workings without going through with reference to an actual survey of these properties. That point on the underground workings in this gap I have spoken of here underneath the Crown Point extends over to the southward from this point. That portion of the section line that I have shown there is a continuous vein and a vein developed by actual working below the whole length of that section. I am speaking of the section line of the whole of the workings with the exception of the seventy-five feet in that gap along here, and is not the point to which I referred here, where the vein rises above the level line through here (indicated), the line leaving the vein and running through the limestone, and reaching the vein at that point; and, again, here to twenty feet or more there is a rise or hump in the limestone, and the level line here fails to develop that vein in that point, but other levels in connection do develop the vein, its course, and thickness.

98 Where the stopes exist, when you see a whole stope out that is an evidence that the vein was there. I should say that fifty per cent. on this sectional map, the vein is worked out and about fifty per cent. of the vein is actually exposed.

I am familiar with the Rock and Dome claims, which lie near them, and also somewhat familiar with their workings. That portion of the apex of this vein, as I claim, showing either the Pinnacle or Crown Point, is represented by the dotted line near the westerly corner. (Witness indicates with pencil the outcrop on the vein on the Pinnacle and Crown Point.)

If we were to produce forward, in their own direction, lines verti-

cal with the end lines of the Pinnacle and Crown Point through this apex upon the dip of that vein, in producing it in that way we do not reach within six or eight hundred feet of the ground in dispute in this case; but in producing a line forward parallel with the end lines, with my view of the true dip of that vein, it will then take in the ground in dispute. The northerly limit in direction is this direction here; the southerly limit in the parallel to it in that direction is here (indicated); both lines would soon pass in between the side lines of the Pinnacle.

99 The variations in my instrument in this survey would be very slight. The Oro la Plata stood north and south, and nst only from this, but through all the workings on the hill, the vein is shown on its dip, not more than one and a half or two degrees from this course, and I may have varied a few feet here and there, but that is near as I can get it; to state the dip and vein within a few feet is as close as one can state it. I found the top, outcrop, or apex on this large contact vein, described, developed in the Rock and Dome. Now, a line that I make with my pointer is where I found an unusually well-defined outcrop or apex. The top, outcrop, or apex, as shown by me in this map, is nearly parallel with the side lines of this claim. The end lines of the Rock claim are very near parallel with the Pinnacle and Crown Point.

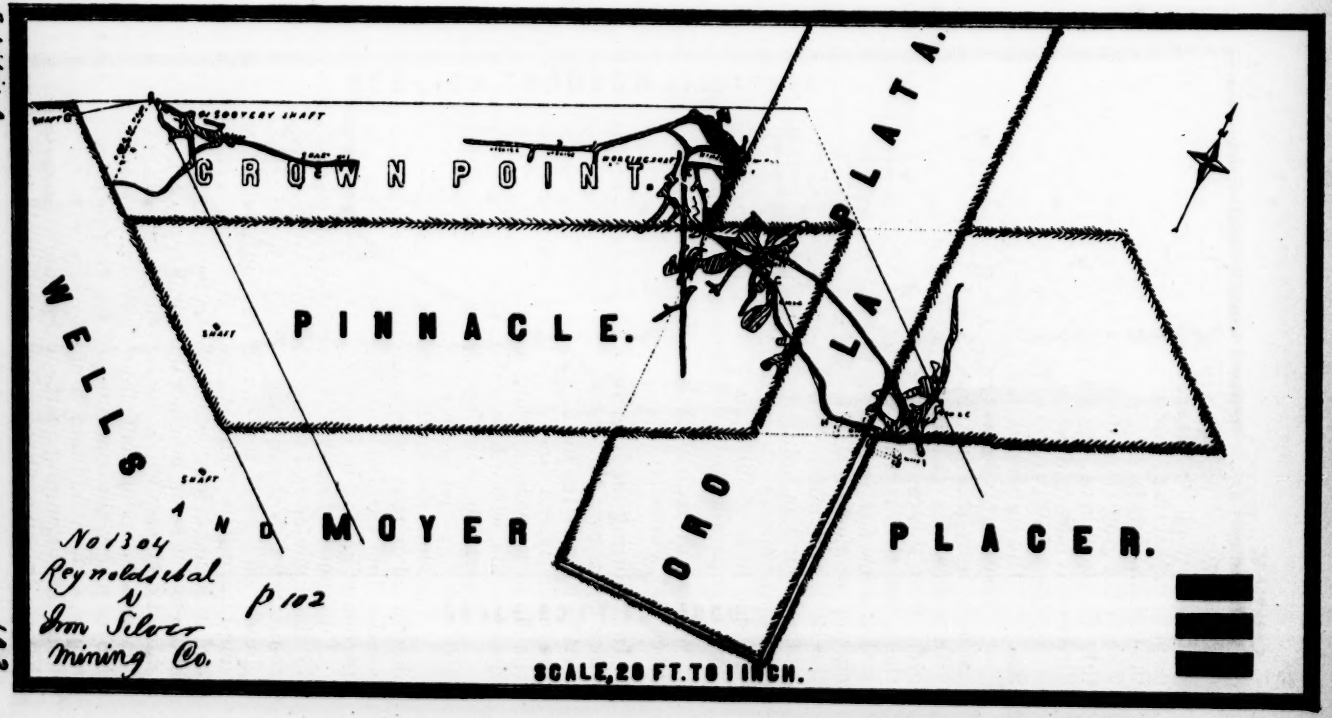
Witness, by request of counsel, here marks apex of vein on the Rock and Pinnacle.

In producing the lines forward parallel with the end lines of the Rock claim over the outcrop here (indicated), they would take in that portion of the top of the vein in dispute; but if you produce the southerly end line of the Rock and Dome claim forward upon the dip of the vein, and also produce the line forward parallel with the end line, where I say the apex of the vein leaves the rock and passes on to the bottom, it will not, most assuredly include

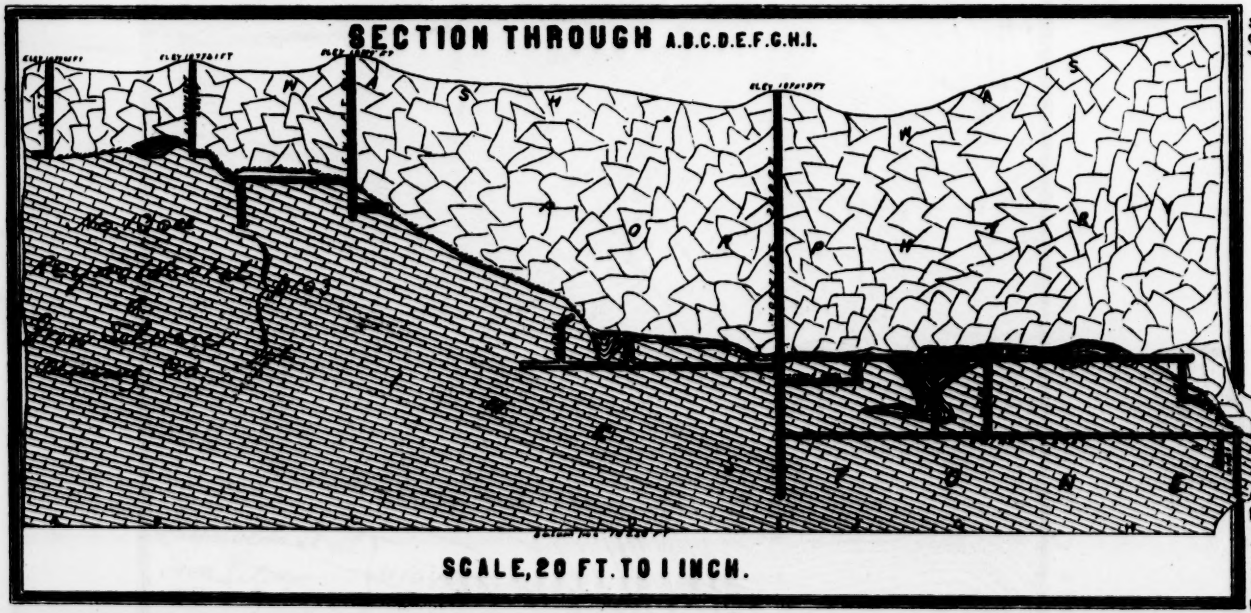
100 the ground in dispute; it would leave it entirely; but if you produce the south end line of the Rock claim forward and downward on that approximately on the true dip and you produce another line parallel with that south end line, you will take in the portion of ground in dispute.

I did not find most of the ore I have spoken of taken in a crevice in the limestone; I found it mostly in the contact, or in chambers connected with the contact. The ore occurs in Leadville mostly in chutes; outside of the chutes you do not find ore, except in very small quantities. The chutes of this mine contain different material in respect from other chutes found in contact veins; the ore chute found being between the porphyry and limestone, I think [I] should designate this a fissure vein; and it is a continuous one, from the actual developments from the point of entry into the Wells and Moyer placer, the continuity of the vein being determined by large stopes, and, in addition to that, assays were taken of the material from the beginning to the end of the vein, certificates of which I have. An ounce or more is an appreciable amount of silver to the ton. The stopes I have spoken of were some of them three or four

Exhibit A.



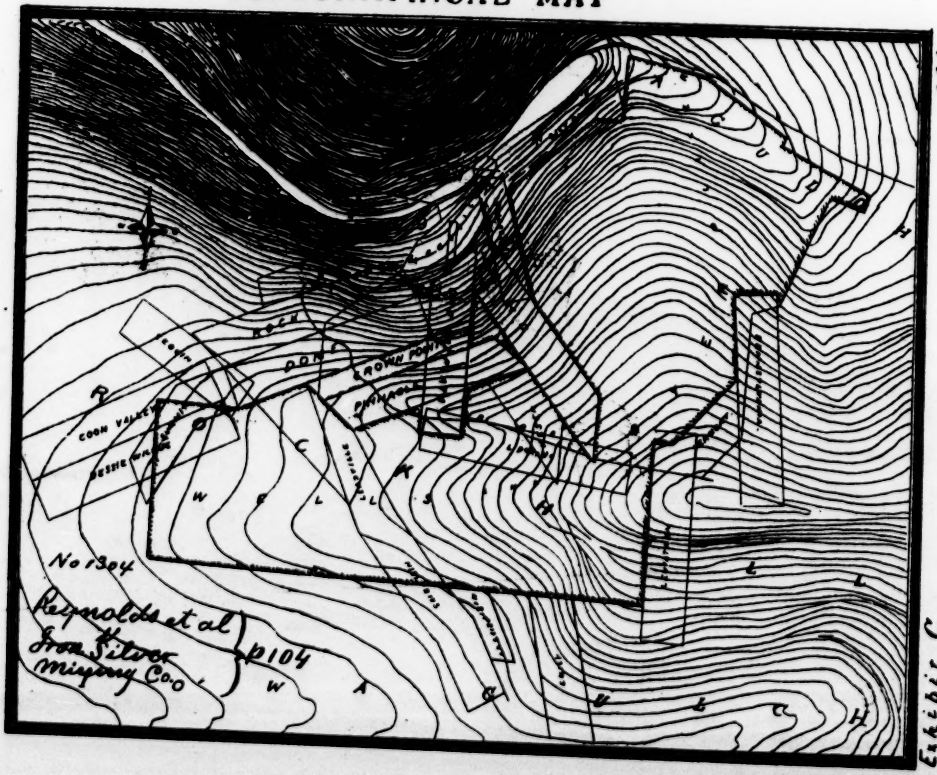
102



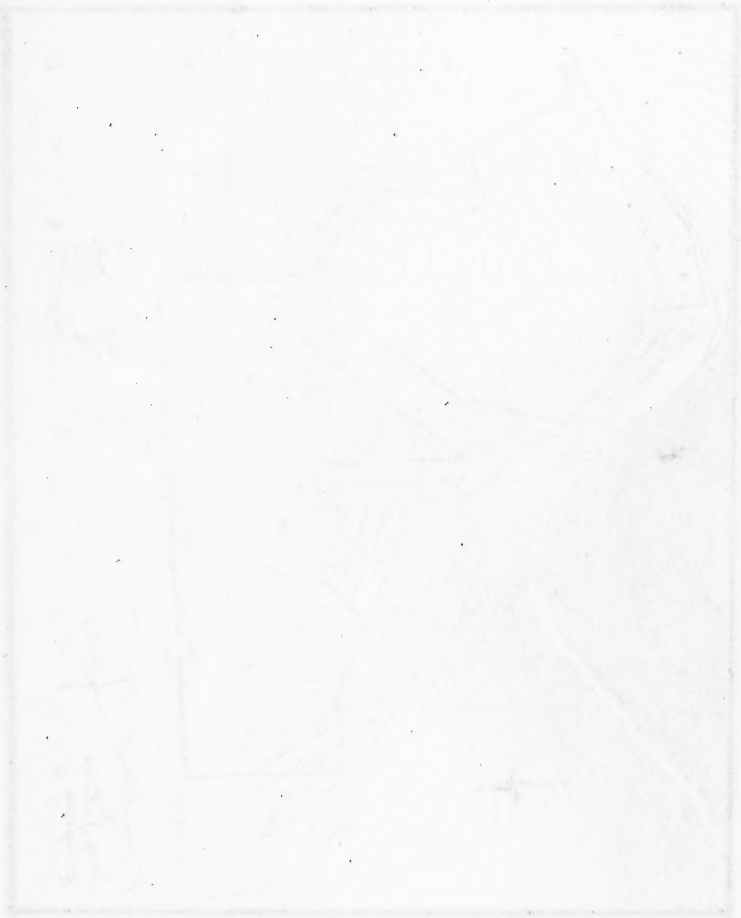
103

Exhibit B.

TOPOGRAPHICAL MAP



104



No 1304
Reynolds et al
v
Iron Silver Mfg Co. } p 105

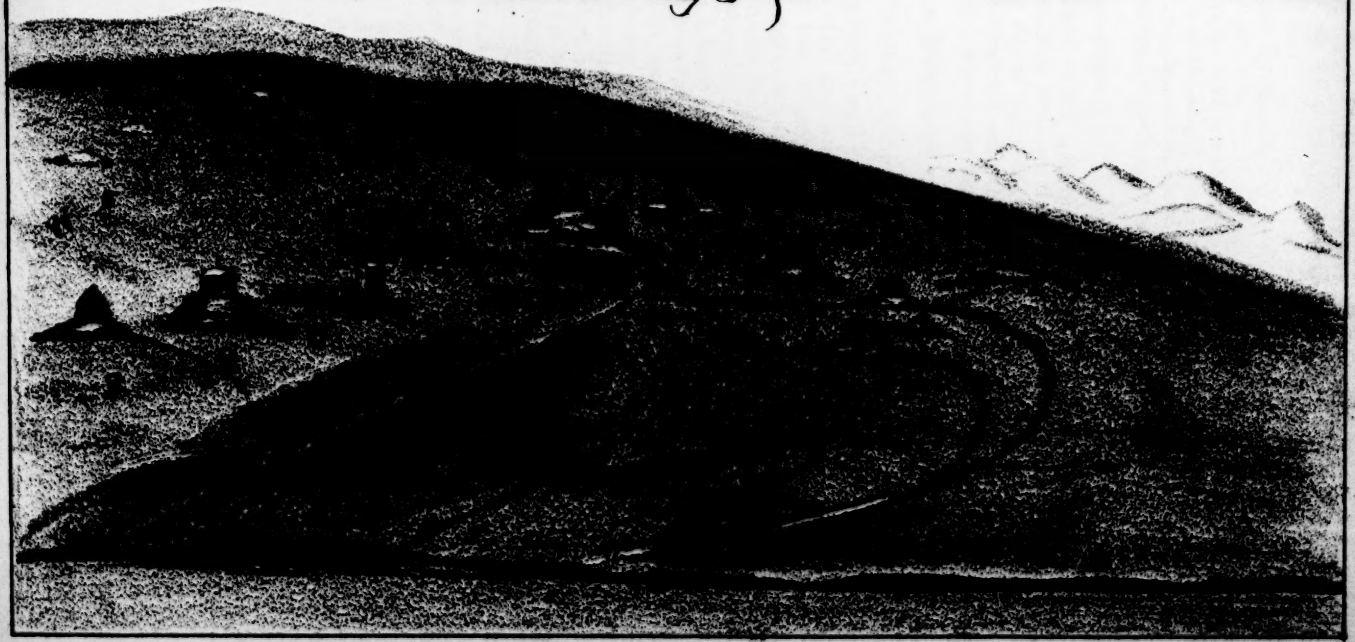


Exhibit D
105

timbers high, four by six, twenty-five feet; the stopes are between the limestone and the hanging wall, conditions which prove
101 its continuity, and these stopes follow the vein from one side of the hill to the other, and you would have to cross the Oro la Plata; the Pinnacle and Oro la Plata claim- intersect, which being about three hundred feet wide, no such an area is represented here.

Redirect examination:

When, in answer to the question of Mr. Symes, I projected the end lines of the rock lode in their own direction it was without reference to the dip of the vein, but in order to cover this ground; if projected in accordance with the drift of the vein they would not take in the ground in controversy.

(Here follow 4 diagrams, marked pp. 102, 103, 104, 105.)

106 F. G. BULKLEY, being duly sworn, testified as follows:

I reside at Leadville, and have for about six years; my occupation is that of civil and mining engineer, which I have followed since 1871; have been engaged in the United States Lake Survey in the survey of the lakes for a period of five years, during which time I worked in Michigan to this country; during the time I have been a resident of Colorado I have been in Leadville constantly, and during that time I have constantly followed the profession I speak of; I have made underground surveys and surface surveys and examined property in nearly every important locality, I think, in that district; this includes what is known as Rock and Iron Hills; I am acquainted and familiar with the Crown Point and Pinnacle lodes; I have become familiar with them within the last twenty days, although I have known them and have been more or less familiar with the surface boundaries of them ever since my arrival at Leadville, in February, 1879; I am acquainted with the placer claim in that section known as the Wells & Moyer; I have known that ever since shortly after my arrival in Leadville, in the spring of 1879; my work has been confined principally to examinations and measurements attending them; I have made some surveys, but no very extensive ones; I have examined the maps referred to by Mr. Page and checked them so far as I could, and they correspond ex-
107 actly with the workings; I will say the first examination I made was on the 30th day of last March; from that period I have spent six days under ground, and during that time I examined all the workings shown upon these maps; this map, as Mr. Page has explained, represents the surface boundaries of the Crown Point and Pinnacle lode and the Wells and Moyer and Oro La Plata claims, and also the mouth of the shaft; the surface of the hill slopes towards the south, California Gulch being on the north and Iowa Gulch on the south; the surface of the hill at every point is covered by a certain thickness of sand and gravel and broken fragments of rock, which are commonly called by miners wash. If one should sink a shaft upon the hill, passing through the wash, the first rock he would encounter is porphyry, and is represented in this

section by the yellow pink (indicated); this is a white rock, or nearly white, and is of variable thickness. As the shaft is continued downward it passes through the porphyry, and the next rock encountered is the vein material, and, passing through that again, beneath is found limestone; limestone bears something of the color on the surface, as shown by this blue tint, and sometimes it is darker and sometimes lighter; the vein material is brown, yellow or black; so the enclosing rocks above and below the vein may be easily distinguished from vein material, and in passing through the
108 workings there is no difficulty in finding what constitutes the foot walls, limestone, and what constitutes the vein material; they are plainly to be discerned as shown on this sheet.

If the hills were sliced down vertically as though with a knife, all of these different rocks would then be exposed to view, and this section is intended to show what would be exposed to view by cutting down upon the red line, as Mr. Page has heretofore pointed out; and passing through this point at nearly the westerly limit of the Crown Point claim is the shaft known as the discovery shaft, which is one hundred and eighty feet deep. Ninety feet of it or thereabouts passes through sand, gravel, and wash material. Reaching that depth, a short distance is passed through the porphyry, and then the vein is encountered, and finally the limestone. The limestone is ninety feet from the collar of the shaft in depth. From the bottom of this shaft, at the depth of one hundred and eighty feet, a drift runs southerly and easterly, the earth being cut down as before explained upon this red line, from the point of the discovery shaft to point "C." Shaft number 2 would show this condition of affairs, both as to the formation and as to the working which developes the formation. Examining this discovery shaft, the wash, por-
109 phyry, vein, and limestone are found, as I said before. Passing through the west and the northwest by a drift from the discovery shaft to point "B," a vein is found for a certain distance having somewhat of a downward slope towards the west; the porphyry is found over the top of the vein only a portion of that distance; the limestone formation, the foot wall of the vein, is found throughout the entire distance; the vein material is found also through the entire length of that drift to near the west end of the drift, where the sand and gravel is as it is at this point "B;" passing from the easterly portion of this working a distance of 25 feet from the bottom of the shaft, the vein is found again, this drift passing through limestone for that distance; here the vein is found, having limestone for foot wall and porphyry for hanging wall, having a downward descent, as shown in this section; following this tunnel the vein is shown in the direction of the Pinnacle, as shown on the section; this working follows vein material throughout its entire length; that vein material goes between porphyry, a hanging wall (rock in place and limestone), the foot wall also rock in place; the bottom of the incline and workings continue level, and passing for the most part through limestone, being below the vein; before reaching that work called shaft No. 1, at point C on the ground plan, and traversing the drift about 30 feet before reaching this shaft, the

vein again descends and goes down to the workings, and is disclosed there through the 30 feet of drift to the shaft. That portion
110 of the vein has a hanging wall of porphyry and a foot wall of limestone, both distinctly in place. The shaft No. 1 has a depth of 140 feet from the surface of the ground down to this level. The first 20 or 30 feet passes through loose gravel; the balance of the 140 feet passes through solid porphyry in place—at the depth of 140 feet the vein is not counted—and again passes with a more abrupt descent towards the east, as disclosed by this drift. The drift shown running toward the east from shaft No. 1, on the ground plan, is started at a depth of 170 feet from the surface or thereabouts. Its level runs toward the east and is entirely in line for 35 feet of its distance; the balance of the distance discloses the vein still having its downward descent, still having lime and porphyry, and still having a foot wall in place. Still following out the line of section is a shaft, designated as a working shaft. The depth of that shaft to the vein is about 180 feet. Of that depth, the first 20 or 30 feet passes through loose surface material, sand, broken rock, and gravel, and follows to the depth stated, until the vein is reached. It passes through a solid mass of heavy, white block porphyry in place. In the shaft underneath the porphyry and upon the limestone the vein is found, and for a depth of about 12 or 14 feet at this point.
111 Upon the vein from the shaft running toward the southeast at the depth of about 285 feet is run a drift or level, which is designated as the first level. It is a passage-way through the rock, having a height of six or seven feet and a width of four or five. It is approximately level. Walking east in that direction (indicating) on the right, and upon the left, throughout its entire distance, for the most part, will be seen vein material. That, as I have stated before, is very easily distinguished both from the porphyry hanging well and lime foot wall by its color, texture, and other characteristics. The porphyry hanging wall is not found throughout the entire length of that drift, but at certain points it is found coming down and entering the roof of the drift, so that it is seen overhead. At a distance of 30 feet back from the breast of the drift, or rather from the winze, it descends into the drift. The porphyry passes abruptly downward, having a dip to the east of about 35 degrees. As the porphyry isn't found constantly in this drift, neither is the limestone, but at points the limestone is found coming up in the floor of the drift, as shown on this section of the drift, so that to one who is familiar with the veins of Leadville there need be no difficulty in saying and distinguishing where the foot wall is, where the hanging wall is, and that there is a vein shown throughout the workings, and constantly descending near the end of the workings,
112 having a porphyry hanging wall and a lime foot wall in place. As this level or drift is only six feet high, and the vein is any where from 6 to 40 or 50 feet thick, the hanging wall and the foot wall seldom appear at one time in view. Where it is indicated in yellow it is running here to the southeast. This is known as the second level. So far as indicated here in section from point E to F on the ground plan, it is entirely in limestone. At a still further

depth of about 50 feet a drift is run, indicated on the main plan by this pink shading, and known as the third level. It also passes, for the most part, through limestone. Occasionally, however, the bottom of the vein descends, coming down from the first level through a pipe tube to the third level; here on the ground plan on the first level is a winze descending directly down, that is 50 feet high. A porphyry, which was found coming down constantly in the drift about 30 feet back of that winze, is encountered again in descending down through that winze. The bottom of the vein is also encountered. Here the vein is thinner. That is a rule in Leadville, where the dip is most abrupt the vein is thinnest; where the vein is least it is the thickest and largest ore bodies are found. The limestone foot wall, porphyry hanging wall, and vein material are found in place. There
113 are also found what Mr. Freeman designated, I understood, as pot holes in the lime. These are portions of the vein which descend abruptly from the vein or contact where the lime has been worn out and ore has been deposited in its place. Such cavities in the limestone are also found in the third level, although they are not shown here in the section. Having spent six days there and examined these workings carefully, the conclusion with me is inevitable that there is a vein which has for its hanging wall porphyry, for its foot wall limestone, and which is continuous from its apex from near the westerly end of the Crown Point throughout these workings, and in and under the surface of the Wells and Moyer placer. The exact position of that apex is difficult of determination. If the hill had been scored more abruptly down, then more distinctly would have appeared the exact point of apex; where, however, the scoring or wearing away has been somewhat nearly on a level, the exact point of apex is difficult to determine. That dotted line, which is shown upon the ground plan and marked "Apex of vein," shows approximately the position of the apex. At any rate, in my judgment, it is no further west, but, on the contrary, if I were to draw a line I would draw it a little further to the east. The direction of the dip of the vein so nearly as can be calculated, and I have endeavored upon other occasions to find the exact dip of that vein,
114 is about north 88 degrees east; that is, just a trifle north of due east, or about in that direction indicated by that pointer, nearly (indicating). As the outcrop or exact position of the apex is difficult of determination, so is the exact direction of the dip, owing to irregularities both in the foot wall and hanging wall of the vein. As I have drawn this black line here on the map (Exhibit —), if it were continued in its own direction it will be seen that it would enclose the area in controversy in this case. The average dip of the vein is, as nearly as can be determined, 15 degrees. That is the inclination which is shown by my pointer, and a mathematical calculation shows that to be 15 degrees; that is, taking the highest point for the surface and the lowest point in the workings so far as developed.

I have known the La Plata claim since 1879, but I never knew it intimately, that is, I never made a thorough examination of its underground workings before. Since that time I have had personal

knowledge of other lode claims bounding or within the boundaries of the Wells and Moyer placer, containing lode or vein. I have made examinations of the Stone lode, which is shown at this point (indicating). That doesn't bound the placer, for it is separated by the narrow claim called the William Redick; and I have also
115 made an examination of the Gilt Edge, which bounds the Wells & Moyer placer on the northwest. That was in 1882 or 1883; I can't remember. California Gulch proper, that part of it that is contained within the Wells & Moyer placer, is from 20 to 150 feet wide. Beyond the influence of the stream in California Gulch, I should say that no portion of the placer on the northerly and northwesterly slope had any value for its gold-bearing gravel, for the reason that the surface material and gravel which is found on that slope, varying in depth from a few inches to a few feet, is composed entirely of the rock which immediately joins it underneath, that is a porphyry. There are not found of the gravel and the portions of granite or quartz rock, any of the other rocks which may come from further up, where the gold gravel ended. The wash there, on the contrary, is composed of angular fragments of porphyry mixed with sand and gravel, the product of the decomposition of the rock immediately underlying. There are no placer workings on the Wells & Moyer claim outside or beyond the gulch that I am acquainted with.

On cross-examination this witness states:

I have, by examining these workings, satisfied myself that there is a continuous contact vein with porphyry above and limestone below, all the way from where I pointed out the outcrop down to the ground in dispute. I find the vein in there actually ex-
116 posed in the workings all the way, or inferentially existing between the workings. I am satisfied that such is the case, on account of the general formation in that district of the veins with the contact, as found lying upon limestone for the foot wall and porphyry for the hanging wall, although it might not be actually traced every foot of the way; I am satisfied with what I saw there, taken in connection with what I have gained from the inspection of other properties immediately adjoining. I made no assays along the line of tracing. In order, in my opinion, to make ore or vein matter constitute a continuous vein, it would have to carry a quantity of silver per ton which might be weighed. I believe that an ounce is considered an appreciable quantity per ton. If it carried less than an ounce at any point, the vein cannot be considered at any point; it must be considered as a whole, because a vein must have continuity to be a vein. If I were to suppose that for 50 feet throughout the course of that section line there was a vein matter, or any crevice matter, or contact matter between the lime and porphyry that would not assay an ounce to the ton, that would be, in my judgment, a continuous vein. If I should suppose that for a hundred feet down that section line the porphyry came close on the limestone, and we had what is usually here called in this district a

"tight contact," with a little colored seam found throughout
117 for a hundred feet, I should consider that an interruption of the vein. If I should suppose in passing down the section line, where the vein is traced by Mr. Page, for 100 feet, I should find what is called a tight contact, where the porphyry came down close to the line, and saw nothing but a little colored seam, and the line or contact be nothing that could assay there that showed anything like an ounce in silver, and a body of ore below the hundred feet and a body of ore above the hundred feet, I would consider the body of ore below to be a portion of the same continuous vein, in my judgment; it would depend upon a good many circumstances. If I found that there was a connection between the plane of contact and the material above the body of ore, I should say it was a portion of the same vein. I have never found any body of ore above the plane—which have been in Leadville in my experience—that would make a difference. I have testified heretofore, and I testify now, that an interruption for a hundred feet with a tight contact, with nothing upon the contact that would assay an ounce in silver, would be an interruption of the vein, and prevent its being, in my judgment, a continuous vein. If there was nothing to follow I should say that it was an interruption of the vein. Where the porphyry and limestone would come together with no material that would assay an ounce per ton, I say that place
118 would be an interruption of the vein—such an interruption as would deprive it of being called correctly a continuous vein or lode, because the vein, as I take it, is not the hanging wall, neither is it the foot wall. but it is the material found between the two; and for that reason, if it is not found between them, the vein ceases for that distance. If the vein, as supposed above, was connected by a color contact, the vein would be continuous; but if I only had the tracing of that section line I couldn't say it was a continuous vein. I should say the continuity was interrupted at that particular point. As to this outcrop, I should say I would draw the line a little further to the east; that is, a little further under the projecting porphyry in place. I would draw it more nearly with the right-hand edge of my pointer (indicating). I think at that point and from that point to the hanging wall and the foot wall, and consequently the vein would be in place from that point down to the controverted territory. If I should produce the southwest end of the Crown Point and the Pinnacle forward and downward on a vein, and also produce another line parallel with that end line forward and downward from the point D, that shows the apex of the vein that leaves the Crown Point, the two lines would not include the ground in dispute. I have never traced the outcrop of the claim con-
119 nectedly as shown here upon the Rock lode claim with absolute certainty, but I have examined carefully various points upon that outcrop. I find an outcrop and apex there, as indicated by Mr. Page by the red mark of his pencil, partly by a positive knowledge and partly by inference. I should say that the line was correct so far (indicating); beyond that there is a depth of wash. I should say that was correct approximately. There is an unusually

well-defined outcrop, and I think there is an apex; just where it is I am unable to say. I never examined these workings carefully at that point. If I should project the northeast end line of the Rock claim, or produce it indefinitely forward and downward, and also produce another line parallel with the northeast end of the Rock claim indefinitely forward and downward, crossing the Rock claim at the point which Mr. Page has marked, where the apex leaves and passes on to the Dome, that would include the ground in dispute. In my judgment, that is a continuous vein down through these workings on the Rock and Dome, supposed to be shown here—through these workings down to the ground in controversy—in the direction of the strike.

On redirect-examination the witness states:

I do not find any tight contact in the workings of the Crown Point and Pinnacle. Where the vein is disclosed in the
120 workings it has a varying thickness of possibly three inches at the thinnest to possibly forty or fifty feet or even more. If the end lines of the rock were produced in their own directions the angle of the dip would not be the same as these end lines; that is, the direction of the dip would not be parallel with the direction of the end lines. The difference approximately or the dip of the angle and the direction I can illustrate better than I can explain in words. The direction of the Rock end lines would be as indicated by my pointer (indicating); the direction of the dip would be as now indicated by the pointer, and these two lines would intersect at some point; they would intersect on the Pinnacle; the direction of the strike would cross the side lines of the two claims at an angle of about 70 degrees; that is the direction of the strike as approximately as I now represent by holding my pointer, and the direction of the side lines is as I indicate now (indicating). If you descended in the direction of the Rock end line produced you would be going more nearly in the direction of the strike than in the direction of the dip of the vein.

On recross-examination this witness states:

In my opinion the true dip of the vein is not northeast. It is very difficult to determine exactly the direction, but I have made
determinations there, and, accepting the result, the true di-
121 rection of the dip would be north 88 degrees west; that is, just 2 degrees north of due east, a slight deflection north from east. The end lines of the Crown Point and Pinnacle are, of course, the same. The direction of the end lines of the Rock claim is as indicated by the pointer as I now hold it, southeastward. The true strike of that vein, in my opinion, would be, of course, a regular line at right angles with the dip; it would make it a little west of north, very nearly true north, but a little west. The true line of strike, as I stated in my re-examination, would cross the side lines of these claims and on to the end lines. It would cross them, depending upon what point you started to draw it through; it would

make an angle with them; it isn't parallel; it runs at an angle with them.

ARTHUR CHANUTE, being first duly sworn, testified as follows, on the part of the defense:

I reside in Leadville; I have lived there about four years and a half—four years and four months exactly. My occupation is assayer and chemist, in addition to which I have done a good deal of mining. I have been engaged in mining for three years, in California Mining District principally, in and about Leadville mostly. My business has to a large extent made it necessary for me to examine and inspect a good many of the mines of Leadville;
122 I have familiarized myself to a pretty considerable extent with a large portion of the district; I am familiar with a couple of lode claims—the Crown Point and Pinnacle; I have known them for a very considerable time; assaying has been done at my office for them for nearly a year; I am personally acquainted with the claims; I examined the claims first as to their underground workings on the 30th day of October, last year; that is the first time that I remember of being in the claims, although I had been on them before; I made a pretty thorough examination of the claims since that time, having been there some five or six times since then; I think I can best explain this examination by these maps; I have seen these maps before; this blue color here represents the drifts as they are cut through the rock looking down, showing here this discovery shaft; at about a hundred feet, I think 100 feet or 110 feet, that shaft goes down, and these drifts run from it at that depth; but I think, say a little less than 10 or 15 feet, at about 90 feet or thereabouts, the vein is first encountered; it is an iron-stained gangue matter underlying the porphyry, which in that particular locality is somewhat broken up; underlying that again is lime; these drifts, as I say, have been run out from this in the direction as shown; going this way there is a dip in that direction; this shaft, being the working shaft, shows a contact between the lime and porphyry
123 at, I should say, about 40 feet deeper than here, so that it would be represented on this map, the red representing the vein matter; lower down in the shaft there is this level, that has been run off; that is in blue limestone, except about 55 feet from the shaft, where it first cuts a vein upon its dip; from that point down it has been followed by an incline for about 10 or 20 feet; somewhere in there. Following the vein down and its dip, the next point we find along here is shown in the Crown Point and Pinnacle workings is a raise here, although I have not been in that raise myself. I didn't see the vein. I got a sample. A sample was given me from there. It was pretty difficult and I didn't go up. The next point is here, which is called the Larson stope; quite a large stope. From that point this drift ran to the working shaft, which is here. You could see where it would go to the working shaft in this point. In addition to that you see it in that working shaft. Now, in that level or through that level, which is the first level of the working shaft represented by this level run out here, we passed up through it to

a point here, and along about there where the porphyry rocks over and descends it becomes much more steep, it being much more flat in here and about here that it is at this point right here. At that point the vein is somewhat thin, pinched out, and, as is usual with the Leadville veins, wherever that occurs, there is almost sure to be a strong pitch, and, generally
124 speaking, wherever these strong pitches occur it flattens out again, what you would call the roof; the contact or vein comes in much better. At this point here there has a winze been sunk, the top of which is in porphyry. I should think that winze was 60 feet deep. About 20 feet, I should say, from the bottom of that winze, there is a little side drift run off in this direction, which has disclosed the same vein which is shown here—right there. The vein running on from here to here is of variable thickness, showing, in a great many places, stopes, from which, I suppose, of course, ore has been taken out. In no place from here to along here is it very tight. At this point its first tightness is shown. Back here the vein comes in on this side of this level, and is first tight—tight contact—but further along when I last saw it, it was Saturday, it had opened out and workings had been conducted on it—looking that way. I took samples; I have marked the most of them.

(Witness here indicates where each of the several samples came from.)

The fourth was from right here near the winze. The fifth was here, or about 35 feet from the end, where the contact first comes in in the roof of the drift in line. There is considerable evidence
125 of stoping in these various workings here, and further, right in here, this drift is run out to about 30 feet of the shaft in lime. There ore, however, places in line where the vein seems to have come back—little stringers leading from the contact. These assays, this one from here (indicating) is very black material about ten feet from the end. This ran four ounces of silver to a ton, averdupois, — troy ounces; the second sample ran two and a half ounces to the ton; the third sample, 37.2 ounces to the ton; the fourth, taken in a sort of a raised incline, 10 ounces to the ton; at this point it was two ounces, and at this point, right here, where the contact became tight, one-half ounce, and at this point, right here, about ten feet away from it, one ounce.

(Witness here indicates the places from which he took 12 additional samples.)

I should judge these samples were approximately 30 feet. I stepped ten paces in each case, with this exception, that from No. 4 to 5, or rather from No. 3 to 4, I went twice the distance. There was quite a large stope there, and I didn't take any sample from that point. I thought that was sufficient evidence of ore. These samples ran, the first, 8.7 ounces to the ton; this one here is one ounce; this one here is 2.2 ounces; this one here is 2 ounces;
126 No. 5, right here, 2 ounces; No. 6, 3.4 ounces; No. 7, 5 ounces; No. 8, 6.2 ounces; No. 9, 2 ounces; No. 10, 16.2 ounces; No. 11, 32 ounces; No. 12, 34 ounces.

I then took samples from this point here. I took four samples running —. They were about 30 feet from the winze. They ran one-half an ounce, one ounce, 2.4 ounces, and .9 ounces. I was handed the samples. A gentleman gave them to me. Mr. Page said that they came from a little drift out of this winze. These samples ran 24.5 and 10 ounces and 6 per cent. lead. I didn't make assays for lead in any of the other samples, although they were samples that I am quite positive would run lead, because I could see it in the ore. I supposed it was lead carbonate. I took two other samples, one about here and the other here (indicating). This sample here ran 14.6 ounces, the sample there 25 ounces. I further took samples here, where the drift running off here—where that stope is running into the drift—which sample ran four ounces. This point right here, a cross-cut in the vein, the second sample came from, which ran 11 ounces. At the corner, where it crosses this cut, or where it met this drift in this corner, it was 5.3 ounces. Another sample was handed to me by Mr. Page from this upraise, which ran four and a half ounces. Now, I want to say that in
127 taking these samples from here and, in fact, all of the samples, I didn't hunt for ore. I just took it as I came to it. I took it, of course, out of the contact. From these several evidences of seeing the stopes, I took it for granted that the contact was good in those places; by the contact I mean that matter which was found in between the porphyry on the upper side and the lime on the lower. I should call that a contact vein. I should say, from my examination, that it certainly was continuous, although there is one point where I have not seen the continuity. (Indicated the point.) The evidences that I found of an outcrop or beginning of the vein are what I have spoken of, the vein being here, and in these workings exposed at that point where it comes most nearly to the surface. I should think the dip was pretty nearly east. I think the angle of the dip is about 18 degrees. That would be my judgment of it. I looked at it at several places, and I think about that, or a trifle less. I am familiar with the Wells & Moyer placer; I know where it is, that is. The only workings for placer that I know of on that claim that would be at all valuable would be, perhaps—oh, five to fifty feet on each side of the creek running each side of California Gulch. There are no placer workings that I know of outside of the limits of the gulch.

On cross-examination this witness states:

I have had a very considerable experience as a practical
128 miner. I have managed or conducted mines in Leadville. The first was the Dunkin; that was about three years ago. I had a lease on it; I was managing it myself. I have been mining by leases. I am a graduate of the Sheffield scientific school of Yale College. My degree is from there. I am not a mining engineer; to a certain extent I am a mining engineer, although I havn't worked in that direction. I am an assayer. I took the course in chemistry and fitted myself in that school. I have not managed mines for any one else except myself and my copartners in leases. I have no doubt

that this vein in controversy, as I have pointed it out, is a continuous contact vein. From the assays that I have made I am also satisfied that the vein is practically continuous. I am also satisfied it is what might be called by miners a pay vein. Throughout the workings where I have examined it I should think so, certainly. I think the vein is continuous from the apex to the ground in controversy. On the line of the true dip of that vein it descends at an angle of about 18 degrees; I should judge about that; it may be from about 15 to 18. Sometimes you find ore passing down into the limestone in crevices and pot holes. The fact that these crevices, cracks, or pot holes are sometimes found in the limestone doesn't at all alter my opinion that it is a continuous contact vein. Were I to
129 find bodies or tons of ore projecting out of a vein into the porphyry above, that would not at all alter or modify my opinion that it was a continuous contact vein. I would call these off-sho-ts, but would think that they were part of the same vein. I have not examined the Rock and Dome claims recently. I have examined part of them. I have noticed—I think I have noticed—that large outcrop on the Rock claim; I think that outcrop, as marked by page in pencil, is about correct. I think that the vein running from the line of outcrop along the Rock and Dome down to the ground in dispute is continuous, although as to that I have not seen these workings here, but I have seen these workings here (indicating). If I should produce the northeast end line of the Rock claim indefinitely forward and downward, and also produce another line forward and downward, across the Rock claim, parallel to the end line, out from the point where the apex or outcrop is marked as leaving the rock and passing on to the Dome, I think it would include the ground in dispute. I should think the true strike of the vein was about north, north and south, and the dip east and west about.

DAVID G. MILLER, called for the defense, was duly sworn, and testified as follows:

My business is a mining engineer. I have lived in Lead-
130 ville, Lake county, five and a half years. I have been engaged in the practice of my profession during that time. I have made surveys of the surface boundaries and underground workings on the Crown Point and Pinnacle lodes from the 28th of July up [to] within the last few days of the present year. I assisted Mr. Page; was working for him until the 1st of October, and since that time I have been in partnership with him. Their work embraced an examination of the formation of the country, together with the existence, if any, of mineral veins, as well as the making of a mechanical survey. My business was purely engineering—making surveys and measurements, obtaining distances, etc. The work was quite complete—checked through two or three times a month; oftener, perhaps. I made these maps exhibited here under Mr. Page's supervision, except this small one here below. I checked them through for the purpose of ascertaining their correctness. They are absolutely correct, to the best of my knowledge.

JOHN EVANS, being called and duly sworn on the part of the defendant, testified as follows:

I reside at Oro City, Lake county, Colorado, about three miles east of Leadville. I have lived there since the 10th of January, 1877. My business has been mining since that time. I have been
131 working on contracts and leases, and by the day. I know of a placer claim called the Wells & Moyer placer; it comes right into Oro City; a portion of the claim is in Oro City. I have known the territory embraced in that placer by that name since 1878. There is a claim—the Redick, the La Plata, the Hunkidora, I believe, the H. D. lode, Pinnacle, Pennsylvania—these claims were located upon a discovery of lode mineral. In 1877 or 1878 I worked on the placer under Mr. Edes' instructions, prospecting for carbonates, and sunk a hole about 30 feet near where the Pinnacle line is now. Edes was the manager for White & Stevens—L. D. White and William H. Stevens. I sunk the shaft about 30 feet. I found an outcrop there—iron and lime—but we never got down to anything solid. It was broken up. We never went down in the solid rock. I don't know of any other prospecting that I did for that company there. I worked in the Rock mine after that—worked under contract. That was in February, 1877, and a portion of January. The last work upon a territory embraced in the Wells & Moyer placer was done in the summer of 1878. Since that time there has been no placer work done there, not to my knowledge; I think not. The last work done there was by Moyer. When we sunk this 30-foot shaft that I spoke of we found what was then called iron carbonates. There was pieces of chunk iron and lime. There was porphyry, usually called croppings. I don't remember whether
132 we shipped from the La Plata, whether we had ore there on the dump, but I think they shipped some ore in the spring. I have been down in the shaft. I couldn't tell how far these workings are exactly from the boundaries of the Wells & Moyer. The shaft is on the north end of this claim, and, as I understand the boundaries of the Wells & Moyer, it is on the south end. I don't know the number of it. The Wells & Moyer boundary is also on the east side line. The Hunkidora and Redick comes in there. This Hunkidora is what is now known as the H. D. Work wasn't done there at that time, not in the fall, but it was in the spring and in 1878. I don't know that they were taking carbonate ores from there then—I think not. It was the opinion in 1878, and it was claimed, that a deposit of mineral in place was underneath the ground now embraced by the Wells & Moyer placer. It was the opinion of the men that was prospecting up there, and my opinion, that there was mineral in that ground about that time. I had no conversation with William H. Stevens during 1877 or 1878 upon the subject—not in the year 1878. I think I had in 1879, in the summer, in Oro, in my house. Stevens said that he believed that that vein of the iron mine extended under that country, and by sinking a shaft he would come down on the same mineral—same contract that he had on Iron Hill. When I examined these workings in the Oro

La Plata I found sand carbonates. I couldn't tell between
133 what formations it didn't have any lime or porphyry. It was iron, and the mineral laid there on the iron. I don't know what the hanging wall was. I should judge it was in place as much as any other mineral around there. I saw nothing exposed to give me any idea whether it had any dip or not. I have not done any placer mining. I am familiar with placer ground. I know what is placer ground and what is not. As to the amount of this Wells & Moyer placer claim suitable for placer, at Oro they worked it there about two hundred feet wide at one place, at the mouth of the Eureka Gulch. I don't know when the work was done, but it has been done there; and down the gulch there is a place 150 feet where they worked out what we called the bed of the gulch, being what we called between the rim rock on each side; that is, the placer. Now, part of the Wells & Moyer placer that adjoins the Pinnacle and Crown Point is included within the gulch from rim rock to rim rock—inside the gulch. It is outside the gulch from rim rock to rim rock there is no placer ground. I think not.

On cross-examination this witness states:

I have never done very much placer mining. I have done some on the Madura placer. I took a lease on that. Didn't find any gold outside of the rim rock. There has been some work done up adjoining the Eureka Gulch. What has been done has been
134 done in the bed of the gulch, inside of the rim rocks. What work I have seen in the Eureka Gulch I wouldn't call bar workings, because it is in the mouth of Eureka Gulch, adjoining California; therefore a short distance the workings are not more than 150 feet wide. There is a bank of clay extending up the gulch not worked out—more clay than gravel. I could not tell you that it is washed. I couldn't say, because it is clay or gravel, but what there is some gold in it. I have had no experience in placer diggings except what I had up there. The ground and diggings right opposite our house in Oro, in California, and Eureka Gulches has been worked within the last four or five years, since 1878. In California Gulch, where you say there was almost millions of gold taken out 20 years ago, there were leases worked there. Right up to last year men were working there. I don't know that they got placer gold. I know they stopped work there. I don't know whether they got any. I never heard of any. I know there has been gold taken out. I don't know what the placer work on California Gulch and Eureka Gulch in this Wells & Moyer ground produced. I understood they worked it as long as it paid, and when they couldn't make it pay they quit. I know that the ditch from Iowa Gulch was brought in across Eureka Gulch, and they brought it, I suppose, for the purpose of working this patch. They supposed it was placer ground, and that it would pay. I don't think there is a large
135 portion of this placer ground up there still unworked which would pay if they had water. It has been tried by a number of parties, and they couldn't make it pay. I heard a man named Fox, who had a lease on there, say so. He had a lease from Alex-

ander, I think, in 1880 or 1881 and during 1881. He said he couldn't make it pay. I didn't hear him say he found placer gold or what he found—whether he found anything or not. I expect there is some gold there, not enough to pay. I don't know anything about how much placer gold to a square yard gravel or dirt should have to make it pay. No, sir; I have not had much experience in placer mining. I know the difference between bar diggings and gulch diggings. Bar diggings is table land that lies up over the gulch or creek a distance; some of that there is probably a bar *there;* that is a couple of hundred feet wide. As to drawing a line between where you pass from the gulch diggings to the bed diggings where there is continuous gravel a long ways up to the side hill, I don't know, I am sure. I couldn't explain. I understand that the gulch diggings are from rim rock to rim rock. Yes, sir; I would draw the line at rim rock. I couldn't tell how far apart the rim rock would be in a gulch that is 100 feet wide. I have no idea. If I passes up a gulch 200 feet wide in the bottom of the gulch, and the ground came up on each side, I couldn't state from that how far apart the rim rocks would be. I have no idea. I am very
136 positive that this bank of gravel I have spoken of in Eureka Gulch is within the rim rock and not on the bar diggings. A man up there told me they have worked up all the good ground that was up there that would pay. The bank of gravel extended up there across a portion of this patented ground. That is not on this placer, but it is on the Alexander. A portion of that is on the Wells & Moyer placer, and the most of it is on the Wells & Alexander placer. The Alexander placer lies up Eureka Gulch from the Wells & Moyer. I don't know where the lines are, but I know the stakes on the Wells & Moyer. The Alexander runs up on the hill—I think it does. The Wells & Moyer placer takes in Eureka Gulch at the junction of California Gulch. It takes in these rich placer diggings. They were rich before they were worked out. I understand that the gulch in front of Oro and Eureka Gulch were worked for placer. Yes, sir; I had an opinion, and it was an opinion away back in 1878, that this contact vein extended under the Wells & Moyer ground. I based my opinion on properties that I had worked. That was a shaft such as the Rock and Pinnacle, Redick, Silver, Montgomery, and those claims that I worked on adjoining the placer. I worked for W. K. —— and Woods on the Myer and Pinnacle, and I worked for a man named Hayes on the Redick. I worked for a man named Edgar, and Morgan, and sunk a discovery
137 on the Silver; and I worked for Rischie and for Maxey Tabor on the Montgomery, and it was at that time my opinion, and the opinion of other miners there, that this vein extended on to that placer ground.

On redirect-examination the witness states:

Eureka Gulch is right directly opposite Oro City. It comes into California Gulch from the south. The widest portion of California Gulch is right at Eureka Gulch. There is a big flat bottom in there. As the gulch goes to Leadville it is more narrow and it becomes

more of a cañon. This work done in Eureka Gulch that Mr. Symes asked about—done by the lessees, I think, was in 1881—I think they leased from the Wells & Alexander.

Mr. DEUTER, being called and duly sworn, testified as follows for the defense:

I reside at Oro, Lake county, Colorado. My business is mining. I have been in Oro City, in Lake county, ever since May, 1876. I have been ever since that time, for the most part, engaged in mining—carbonate and lode mining, not in placer mining. I know of a placer claim called the Wells & Moyer, near the town of Oro. I have known of it ever since the spring of 1878. I have been familiar with the ground that is embraced within its boundaries ever since 1877. I am familiar with the lode claim
138 called the H. D. I first knew such a claim in the spring of 1876. I was one of the owners of that claim. I first examined it, for the purpose of ascertaining what in the way of mineral in rock in place it contained, in January, 1878. The H. D. lies west of the Wells & Moyer placer claim. It is adjoining the placer. In January, 1878, I found in the H. D. iron carbonate; I should judge it was in rock in place. I disposed of that claim to William H. Stevens, I think, the first of February—some time in 1878. In these negotiations as to the disposition of the property he wanted to know of me if there was mineral in the claim, and I told him there was, and showed him three different assays from out of the claim. I think two of them ran seven ounces and the other ran two ounces—in silver. At that time he said something with reference to future locations by myself in the event he bought this property. He had an article written out and wanted us to sign it and swear that we would not make any locations above this H. D. lode—any lode locations—which we didn't do. I would not. That was on what is now called the Wells & Moyer placer. I assisted in the survey of that placer. I pulled the chain over it. I assisted Mr. Bates. I had conversation with William Moyer with reference to my fee for carrying the chain and surveying it; that was in
139 Oro City, in his cabin. I spoke to him about the pay, and on account of the deep snow I charged him five dollars a day for pulling the chain, and he said he didn't care, it came out of Stevens' pocket, anyway. That was in March, 1878. I had conversation with Mr. Stevens with reference to the dip and probable direction of the vein in the H. D. That was in, I think, February, 1878. He thought the mineral extended in that hill up in under the hill above the H. D., under the Moyer placer. He said he thought this mineral ran under the Wells & Moyer placer claim through the H. D. under the ground. That was not known then as the Wells & Moyer placer. I think I first knew of the Crown Point and Pinnacle, or either of them, in 1879. I have never worked in neither of them. I have never worked in the Ora La Plata. Those who were working the La Plata mine at this time were taking out ore—about that time there was ore on the dump. I didn't go into the La Plata shaft. The present southern bound-

aries of the Wells & Moyer placer are not the same as I helped Bates establish there. The boundary, if I recollect right, was about the end of the present eastern end line of the Crown Point and the Pinnacle.

Witness states on cross-examination as follows:

When Stevens bought this H. D. claim he wanted me and
140 requested me to enter into a contract not to locate claims further up or further down on the supposed dip of the lode. He didn't say anything about a compromise because of my locating that claim on the dip of a vein which he claimed to have the right to follow by virtue of having located it on the apex. I didn't locate the H. D. claim; I bought the claim; I bought an interest in it. Stevens claimed to me that he thought the mineral ran under there from the Stone lode. He didn't say anything about owning a vein running under the H. D. by virtue of owning the outcrop and apex of the Stone; well, as a matter of fact, I thought that that was his intention. This H. D. claim is up on a side hill above the La Plata. The northeast end of it doesn't extend down into the gulch, if my recollection served me right; I don't think it does; it passes down the hill in a northerly direction very near the gulch; it comes down pretty near it. I think the Stone claim is attempted to be located on the line of the outcrop and apex around in California Gulch; I should judge this continuous contact vein we have been talking about, it is supposed to dip from the outcrop of it in the Stone claim in an easterly direction and pass in the H. D. lode. That was a kind of contract that Mr. Stevens wanted to buy this claim of me; that he wanted me to agree not to locate any other claims over the dip of the lode, and not to beat him into another
141 compromise. I think I first knew the Pinnacle lode some time in 1879; I never did any placer mining; I do not pretend to know by walking over the ground whether it is placer ground or not.

Witness states on redirect-examination as follows:

The H. D. lode was purchased on account of its conflict in boundary-line with the William Redick. That was not owned by the placer and Stevens.

ALBERT E. CHANDLER, being called and duly sworn, testified as follows on the part of the defense:

I live in Leadville; I have lived in Lake county since 1877; my occupation has been mining—lode mining, but mostly in carbonates. I know a claim called the Pinnacle; I worked there in June, 1877; I don't remember how long it was; we were working in loose rock the last work we did; I wasn't doing any digging except cleaning out the shaft. After being cleaned out it disclosed—well, there was a mineral deposit at that time; there was gangue matter and there was loose rock and porphyry and iron. I didn't work except to clean the shaft; I did no work there after this time; I never measured the shaft; it was somewhere near 80 feet deep when there;

it was sunk through loose rock; it seemed to be a little porphyry over the mineral, that was all; I couldn't say the porphyry
142 was in place. The shaft through to mineral; no drifting at all. I worked in 1877—was just sunk—on the William Redick. I don't know whether that joins the Wells & Moyer. At that time I don't think that placer was surveyed. I have an idea where it is now. The William Redick I worked upon was upon California Gulch. They were sinking in porphyry. I know about the time the Nisi Prius and H. D. lode claims; I worked on the Nisi Prius one shift; I think it was in the latter part of 1877 or the first of 1878. That work was in iron and mineral they claimed to be in place.

Witness states on cross-examination as follows:

I should judge the shaft on the Pinnacle that I worked on in 1877 was about 80 feet deep; I didn't measure it. I wasn't doing the digging. I was retimbering it. My work was to help get the water and dirt out; they were enlarging it. The shaft struck the contact—that is what we call it, I call it that. The survey of that shaft in the Pinnacle is not the same, and this may have been as it was when I worked there. I know where the shaft is on the Pinnacle with reference to the boundary lines, but I don't think that map is the same, I think it has been changed. I suppose the shaft must be near the end line of the Pinnacle. I couldn't tell whether that shaft (indicated by counsel on the map) is the one or not.
143 As near as I can tell it is 80 feet, it may be 90; it had penetrated in contact mineral; it was black iron. The overlying rock over the mineral was what we would call gangue or talc porphyry. Above this gangue matter and talc was a sort of loose rock—porphyry we call it, I should call it that. I went down there and was picking the rock to see how it looked. From the bottom I picked about three or four feet. They were putting in timbers. I was taking out the water and dirt. I don't know how long I worked there; it was only a short job taking this water and dirt out; it was being timbered. I don't know when the shaft was sunk. This work that I am speaking of was in June, 1877. I didn't tell you there was porphyry in place—just what you commonly call contact; I didn't see the line; I judged I struck contact by the mineral; I don't remember how thick the mineral was; I don't know that it was two inches; I don't know whether it was two inches. I should judge it was down, perhaps, two or three feet; there was some of this mineral on a dump; I don't know anything about whether it assayed anything. I suppose this was the discovery shaft of the Pinnacle. I should call the rock in place in that shaft; when they got down to work the dump got solid. I couldn't tell whether the dump at that place showed nothing but boulders and wash, such as is understood to exist in that hill at that point,
144 for considerably over a hundred feet deep. I examined the dump; there was some iron on the dump; I saw iron there. I judged from that they had a contact. As a geologist I couldn't say as to rock in place; as a miner I should think they had a con-

tact; I think it was in place; I say from my experience what I know about it. I have mined ever since 1874 in Park county. These diggings are different from those there—entirely different. This shaft was sunk through entirely different material from anything I have seen there. I was told the shaft was sunk in rock in place down there, and they had sunk through boulders all the way, and wash.

C. C. BALDWIN, being called on behalf of the defense, was duly sworn, and testified as follows:

I reside in Leadville. I have lived there about seven and a half years. I am a civil and mining engineer. I have been engaged in that pursuit since about 1872. I have been constantly engaged since that time about Leadville, in the business of civil and mining engineering most of the time. I reside in Lake county; when I first lived there, in what is now the lower part of Leadville, it was called then Slagtown. I never resided in Oro City. I have been acquainted with William H. Stevens since the spring of 1877.
145 I know Mr. L. L. Lighter. I became acquainted with him when he bought into the property in the fall of 1877. I know Thomas S. Wells and William Moyer. I am acquainted with the two claims on Rock Hill known as the Crown Point and Pinnacle. I have known of them since the summer of 1877. I am also familiar with other locations and mining claims in that neighborhood—quite a number of them. I know a claim called the Oro La Plata. I understand it is the oldest location on the Rock Hill. In the fall of 1877 and early in 1878 I made surveys that were intended for a patent on the Pinnacle lode. I think that most of the stakes were found at that time. I couldn't state all of them. That has been some time ago. I have examined the Crown Point and the Pinnacle claims for the purpose of determining the apex of vein. That was last Sunday, the 16th of the present month. I also made an examination for the purpose of determining the dip of the lode. I found in the extreme westerly workings of the Crown Point, where it was indicated by this drift here, evidences of an outcropping lode. At both of these points drifts have been run in the wash. A little east of the points here are evidences of a foot wall, which I would consider in place, and also the hanging wall in porphyry *in porphyry* in place. Then in passing down in this direction—that is, easterly—most of the distance the foot wall and contact could be seen readily and shown, as in this map, with the exceptp-
146 tion of a small place here, which is shown on a section, where the contact ran above the workings. It was a continuous vein from the westerly extension of the Pinnacle workings from the east shaft, No. 1, called here the Crown Point shaft. I then went down the working shaft to this point, and I made examinations through the different levels, as indicated here, from the extreme west to the eastern part, finding in a good many places a contact showing porphyry above and lime below, and in some places, as it was here and here (indicating), the drift was in lime with mineral contact and the vein above, on account of its dip. I noticed in all

of the workings a dip in an easterly direction, which would be indicated by the pointer in that position (indicating), amounting to from 15 to 18 degrees above the horizon. The mineral deposit was continuous, with the exception of a few places where the development had gone through the lime, as it is in this particular case. There is also a place here that had not been exposed—the vein. I call that a contact vein. I have been familiar with the H. D. ever since 1877. I made surveys in June or July, California Gulch and on Iron Hill, taking up the territory to the eastward of the Iron mine and on a line of several of the claims that they owned on Iron Hill. They were to be surveyed for patents; they had been troubled with parties owning lode claims within these boundaries, who came to the
147 agent and insisted upon taking up these lode claims, or placer claims, and getting patents on them over the lodes; and they brought such influence to bear upon Mr. Worden that they dropped the application for patent and finally dropped the application for patent for this placer here. We intended to get the patent for the placer upon what was then known as the Stevens & Lighter placer here; finding that they couldn't succeed, I was informed by Mr. Stevens that they were intending to let the Wells & Moyer placer men in this vicinity get a patent on the ground which lay to the south of the Rock and Dome, and deed to them—get a patent in their own name, which was afterwards done. In conversation from time to time with Stevens, he had the idea that the lode exposed along his line of lode claims extended in the east direction on the dip, and that by taking up placer claims on the outside, they could keep parties from getting patents on them and to keep parties from sinking further down on the dip, and save trouble that way by getting the title to the surface ground, and it was also for the timber that lay on the claims; but it was for the purpose of protecting the title to lode claims. There were no placer improvements. There was a shaft sunk just west of the Crown Point—two shafts—it was on the summit lode—which were to be used as improvements on the Stevens & Lighter placer. The westerly
148 shaft, which was the discovery shaft, on the Summit lode, was something like 15 or 20 feet deep, and had struck — 1877. It was owned, I think, by a man named Col. Donaldson. I was one of the owners. The Neesing was owned by McDonald. I went down the discovery shaft of the Neesing, which is located in here, or at the time I made the survey—that was in 1877. The developments of the Neesing showed crevices of porphyry which I understand have assayed pretty well. The depth of the shaft, I think, was about 40 feet. It wasn't sunk to contact. I have not examined it since it was sunk to contact. I didn't make the patent survey of the La Plata. I haven't made an examination of the La Plata since 1877. I did then. The discovery shaft of the La Plata then was located at this point (indicating), at a strip about 50 feet wide, and disclosed mineral in rock in place by the side of the discovery shaft. I think there had been a little winze made by prospectors. That was in 1877. I know at that time of a claim called the Summit; that is at the west end of the Crown Point and Pinnacle. That is the ground now comprised in the Wells & Moyer. It was located by Mr. Wood & Stevens—

William H. Stevens. It was located in 1877. I made a survey of a portion—well, I made surveys, including the Gunnison, and I also made a survey for a portion of this placer, which would be
149 about the west half or one-third extending in this direction (indicating). I think that was late in the fall of 1877 or early in 1878. It was made for Stevens & Lighter. It was then known as the Wells & Moyer placer. The Wells & Moyer placer claim was on what was known as Eureka Gulch, indicated here by that boundary, and along California Gulch near its mouth. When it was surveyed it was called the Stevens & Lighter placer. I was employed at that time by Messrs. Stevens & Lighter to make several surveys for placer claims—one on the north side of iron. I couldn't say whether it was iron in place or not. This action of Stevens & Lighter in taking up the claim under the names of Wells & Moyer instead of Stevens & Lighter was for the simple reason that there was a prejudice against Stevens & Lighter and their propensity for getting title to ground in that vicinity, and so they were to get their patent under the name of Wells & Moyer, who were known to be placer men—so it was done in that way. I am no placer man, and know but little about it. I think it was generally conceded and known in that locality at the time of the location of the Wells & Moyer placer that underneath it was a lode or drift of mineral in rock in place.

On cross-examination this witness states:

150 I didn't trace this vein continuously, sir, all the way from this little piece of outcrop near the west end of the Crown Point down through these workings. There was a little gap here and there caused by the workings not connecting on the vein. So far as I am able to judge from present developments I think it is continuous. These irregularities are characteristic of a contact vein in that district. I have had considerable experience with that contact vein and almost many miles of workings on it. I know where the Rock and Dome claims lie. I am somewhat familiar with these claims. I have seen the outcrop of the Rock and Dome claims in some of the workings. I am somewhat familiar with the outcrop on the Rock lode, the apex — which is represented on this map by a line drawn here yesterday with a pencil by Page. I think that about correctly represents the line of apex and outcrop of the vein where it crosses the end line of the Rock, and then leaves the side line and passes on to the Dome. There is a pretty large outcrop at the Rock lode, an unusually well-defined outcrop. There is a good deal of broken rock; it might be called an outcrop; it is an outcrop at several points. I know these workings along this outcrop. If I were to produce the northerly end line of the Rock claim indefinitely forward and downward, and also to produce another line across the Rock claim parallel with that end line,
151 indefinitely, forward and downward, and crossing the claim at a point where the apex leaves the Rock claim and passes on to the Dome, and from the Dome to the Rock, it will, in my opinion, include this part of the vein in dispute in this case. If I

should produce forward and downward the westerly end line of the Crown Point claim, and then produce forward and downward another line drawn to the point where the apex, as shown in this map, passes over from the Crown Point claim, that would not include any portion of the downward portion or dip of the vein in dispute. I was acquainted with the Wells & Moyer placer in 1877 and 1878. I know of their working placers in Eureka Gulch. I did not know at that time of their purchasing a large number of other placer claims around on the gulch and a portion of the side hill covering nearly the whole portion of this patented claim. I think that in 1877 and 1878, on the latter part of 1877, the ground embraced in the westerly portion of the Wells & Moyer claim was vacant ground. A portion of it not owned by Wells & Moyer, the westerly portion of what is now known as the Wells & Moyer placer, was vacant ground. I have been frequently over that ground making surveys and making maps of that territory, and I never found any description of the Wells & Moyer placer at that time that covered that territory. If this portion was located and
152 owned by the Wells & Moyer placer in 1877 it was very late in 1877. I think it was in 1878, for the consultation occurred early in 1878. Yes, sir; on this northeasterly portion of the placer diggings there have been considerable diggings from Eureka and California Gulches, which are within the boundaries of this placer claim. There have been many placer claims possessing titles there which existed since 1860, and a portion of these placer claims along Eureka and California Gulches are included in this Wells & Moyer placer now.

Wells & Moyer were not actually carrying on quite extensive placer minings when they applied for this patent. They had gone to expense in bringing what is called the Iowa Gulch ditch to get water on that property on this placer. They were carrying on placer mining there with the water that was in this ditch which they brought in at and before the time they applied for the patent.

On redirect examination the witness states:

The proportion, that is, the amount of actual placer ground on the Wells & Moyer placer, compared with the entire Wells & Moyer placer, approximately, would not be over five per cent. of the area—from five to ten per cent.

153 CHARLES A. YORK, sworn for plaintiff:

I live in Leadville; occupation is mining; lived in Leadville since 1877; business has been that of mining. I know the claim called the Leadville claim on Rock Hill. I was one of the locators of the Leadville claim; located it in the spring of 1878. It is on the Wells and Moyer claim. Before the location of this claim I discovered nothing before we located it. I am not quite positive when we discovered mineral or rock in place in that claim—whether it was in December or January—December, 1878, or January, 1879, possibly. I know Thomas Wells; was acquainted with him in 1878. I did not know him until after the patenting of the Wells

and Moyer claim. I knew him in the fall of 1878, possibly in September. I had an arrangement with him concerning my title in the Leadville lode, on the Wells and Moyer claim, so my title could be preserved. I had a bond for a deed. It was not in consideration of that bond that I had that I failed to adverse the application. I did not adverse their claim because I did not know of it. It was after their application that this agreement was made for a deed. I could not say how they came to give it to me. I asked them for it and they gave it to me. Afterwards I received a conveyance of the property.

Defendants introduced in evidence a certified copy of the
154 bond and deed above referred to. The deed is dated April 29, 1879, from Thomas S. Wells to William Moyer, B. Hepner, M. J. McNeary, and Charles A. York.

The character of this mineral that I found in the Leadville claim was a sort of iron rock; it was hard mineral; I would judge it was in place; it was between lime and porphyry.

Cross-examination:

I located the Leadville claim in the spring of 1878 or summer; I would not be possitive of 1878; had not discovered a mineral vein when I located it and filed certificate; discovered a vein in December or January, I would not be positive which; when the application for patent was made on this property I claimed that I had located and discovered a lode mining claim and it should be excluded from the placer patent. I wanted a bond for the premises from them, and they agreed to and did give me a bond and deed for that ground included in that claim; that was in the fall of 1878; the bond was for a certain length of time. That is the bond mentioned here.

J. R. LOKER, produced and sworn on behalf of defendants, testified:

I live in Leadville; have lived in Lake county, Colorado somewhat over six years; am the agent of the St. Louis Smelting
155 and Refining Company; have been engaged in that particular occupation somewhat over six years; have been the agent of the company for that time; am acquainted with the claims called the Crown Point and Pinnacle on Rock Hill; have known them since, probably, January, 1877; am acquainted with August R. Meyer; am interested with him in those claims. I first made an examination of these claims to ascertain whether or not there was mineral in them in October, 1877; I visited Leadville in October, 1877, to see the St. Louis company's works blown in the smelter, and also to see this property which Mr. Meyer, myself, and associates had bought and located. This Pinnacle shaft was then down and shipping ore. I went into the shaft; as to character of ore in it I could not say; was not sufficiently acquainted with mining just at that time to tell exactly how the mineral did lie; whether it was in place or not. It was all crumbled in; my idea of the shaft was it was 180 feet, but I found on visiting it that it was 108, and I sup-

pose I got the two figures mixed up; I noticed three or four stakes on the ground at that time (indicating on plat); they were this stake here where the jog comes in here, and this one here; was interested in other lode properties at that time; when I went on the property I was taken over it by Mr. Meyer; I saw our agent also, and he had located a number of claims, laying all out
156 here; the nearest one of them that I remember is the Leadville shaft, that is the one he bought; I don't remember, but think the shaft was sunk on it at that time I talked of it; it was a shallow shaft. I hav'n't been on that ground for years. There were other claims located on what was called the Wells and Moyer at that time; I don't know whether they were staked and recorded at that time or not; I could not tell really at that time whether or not it was then generally known and claimed that a mineral deposit in rock in place underlaid the territory that is now comprised in the Wells & Moyer placer; when I took possession of the properties in 1878 to work them there was no work done by me outside of the Pinnacle and Crown Point; there was work going on in 1879; I found minerals there all the way from 2 to 6 feet in rock in place—that was the Pinnacle. I made an examination of the Crown Point at that time; there we had simply porphyry; that was in that shaft on the Crown Point that was then known as the Pinnacle claim; this map here is entirely changed from the claims as I knew them. I have never seen this map before. On that map there, about where "Crow-'s" is, was then a part of the Pinnacle. The Pinnacle came up in that direction (indicating) in this "L," and would very likely be the discovery of the Crown Point, and where I found min-
157 eral from four to six feet thick in 1878 was here in this part in a portion of the Crown Point. The boundaries were changed when the patents were applied for.

On cross-examination this witness states:

I say in 1878 that there was no discovery on the Crown Point—nothing but porphyry in the shaft; I might go as far as 1879; there was no discovery in the Crown Point, nothing but porphyry in the shaft—discovery shaft. Meyer at that time had purchased the claim for himself and his associates, and I was one of the associates. I saw a shaft on what is now known as the Leadville claim in 1877. I am pretty positive that taking me over the ground Meyer pointed me out a shaft where I locate as near as possible now at about the Leadville shaft.. There was no discovery of any vein or crevice there at that time. The shaft might be twenty-five or fifty feet, not to exceed fifty feet, deep. No discovery of mineral that I saw. There was mineral in the Pinnacle lode.

On re-direct examination this witness states:

When I say that there was no discovery in the Crown Point until some time in 1879, I mean that there was none in that portion of the Crown Point that was included in the location as it then was
158 on the ground.

On recross-examination this witness states:

WITNESS: (Indicating.) That is the discovery of the Pinnacle between "O" add "W." There is what we call the Crown Point discovery shaft. At the time I mentioned there was nothing but porphyry, and no vein or crevice in the shaft I have just pointed out as the Crown Point. There was ore being shipped from there, but it was within the boundary lines of the Pinnacle, and not of the Crown Point. The lines of these claims were afterwards changed. When the lines were changed the discovery shaft of the Pinnacle was left out of the Pinnacle and included within the now Crown Point workings. I learned that last Saturday—the first I knew of it. I don't know when the lines were changed, but it was my intention before I sold the property to change the lines as now changed. I sold the property in 1879. I don't know when the lines were changed.

LEON HARDY, sworn for defendant:

I reside at Riverside, Chaffee county; have lived in what was originally Lake county 22 years; during that time I never lived in Oro City, but I lived in the vicinity, where Leadville is now, in 1883–4; during the time of my residence in that section
159 I more or less examined mines and had been engaged in the mining business, placer and lode mining; my experience has been in California Gulch and *of* the Arkansas; California Gulch is the gulch that leads to Oro; placer mines in this section in 1863 and '64 —; am somewhat familiar with the premises known as the Wells and Moyer placer, and am familiar with the premises known as the Crown Point and Pinnacle claim; I have known of the section as comprised in the locations known as the Crown Point and Pinnacle, and it seems to me first knowledge of the- was in 1878; did not make any examination of them then; just knew such claims were there, and first knew of the Oro la Plata claim as one of the early discoveries, but cannot give the date of it; it was long previous to that time; it was along in 1875 or '76; I have made examination of that part of the country; have examined the Pennsylvania and Rock mines; this Pennsylvania mine is in the northeast corner of the placer claim; first knew of it in 1873, when I was on the ground and examined the stuff that they were taking out; I did not go into the workings; on the surface they were taking out silver and gold ore, and as they extended down they took out iron and galena; I made an examination of the Rock long previous to the discovery and location of it as the Rock mine; prior to 1877 I made an examination of that hill for the purpose of finding
160 placer ground. That was in the summer of 1868. I was prospecting up there for placer ground and lode claims. I found placer deposits at that time—in August, 1868. I found outcroppings of iron on the ground where the Rock mine is and the Stone mine, and up to the Dome, and still further I made lode locations. That was upon this ground, in the vicinity of the Wells and Moyer placer. I abandoned these locations. I first had assays made

and they showed silver; but we had no use for silver in those days—we were looking for gold. I know of a great number of holes that were sunk inside in the gulch and the side lines of the Wells and Moyer at that time; that is, outside of the immediate area of the gulch; quite a number were made within it, all the way from 1860 up to 1875. They were made by Captain Breece. He sunk a good many holes. Some were made for placer mine prospects, and outside of the gulch for lode prospects. I found a vein or outcrop south of the Pinnacle, on what is now the Wells and Moyer, in 1868. The kind of vein was iron and iron outcrop. When I say iron I mean iron carbonate. I mean by that vein matter. It is similar to the outcrop of all the silver-bearing veins in that district. I am familiar with the present boundaries of the Wells and Moyer placer claim, and, in my opinion, only from five to seven per cent.
161 of the Wells and Moyer placer claim is placer ground which would be located going down into the gulch and a very small portion of Eureka Gulch. It is territory that has long been worked as placer ground. I do not think the remainder of that placer claim is available for placer purposes, or contains placer gold. I do not think it contains any placer ground whatever, except that portion of Eureka Gulch that extends down into California Gulch. I think a part of the 5-20 mine extends up into the Wells and Moyer placer. That was a located lode in 1865 or '66, and another mine by the name of Champion, and another by the name of 1860, as Captain Breece called it; he discovered it in 1860. The 5-20 was a gold location; they treated the quartz in the Oro stamp mill, and the Pennsylvania had found gold on the top; and there was another lode Dave Fulton was working called the Sliver lode; that was in 1867–'68. I am acquainted with William H. Stevens. Know him since 1870. Been quite intimate with him. Had conversation with him in respect to this territory in the spring of 1877 at Riverside, at which time he came out from Detroit and stopped at my house. He had three or four hundred men, whom he had employed in Detroit, to assist him in his operations. We had a conversation regarding the mines up in California Gulch, and he invariably spoke in a very disparaging way of them, said the ground was not worth anything,
162 &c., and finally I made the remark to him that I thought his actions were belieing his words; that I did not know why he wanted to bring so many men when he knew the country was not good for anything; but finally before leaving he got his men to go out of the room, and then he told me that he had stayed there on account of the mines; that he had others with him, but he did not propose to say anything to the men, for if he did they would be leaving him and going on their own hook; that he had thoroughly examined the ground where the Rock mine is now located and the Stone mine; that he had shipped ore the year previous, and that he proposed to go up there and secure the ground; that he was going to make large developments; that there was a large outcrop of carbonate ore there; that there was a large deposit of ore there; that he was satisfied from the examinations he had made the summer before that there were large ore deposits there, and he was con-

fident that the country up there would be good; and I know by his subsequent action that he did just as he said he would. It was the general opinion and claim, at the time of the location and patenting of this placer claim, that there were large deposits of mineral there in rock in place underlying it.

Cross-examination:

163 I have prospected up and down where this placer claim is now situated. Did not prospect up on the side of the hill expecting better diggings, but would have prospected there if I thought there was any. I prospected for diggings up the slopes in California Gulch. I am not aware that overlying a large portion of this ground included in this placer there is a deep wash that carries placer gold, and what I say is based on my judgment as a miner, and one who is used to placer mining. My judgment is that only about 7 per cent. of that placer claim has any placer deposits in it. I say this simply because I prospected it, and I would just as leave go on top of a mountain peak as on the rest of that placer claim, from the appearance of that ground up there. I prospected it up on the Rock. Back in 1868 there was a large outcrop of carbonate ore there; this Pennsylvania lode, I think, from the Rock lode, and somewhat south. It must be about four or five thousand feet away. I could hardly tell how deep the shaft was on that lode; it was in wash, gravel, and boulders. I took out some free gold ore right from the surface and got it treated, I think, in a 5-20 mill. On the surface it was a decomposed, broken up galena. We found free gold; it was in the rock; decomposed material; just about the same as we have in the Printer Boy Hill. They could wash some of it out in a pan. Had to crush and wash it. My experience as a miner
164 does not teach me always that wherever we find such deposits as that there is always found placer deposits immediately adjoining or in the immediate vicinity of placer gold. I have had experience in gold mining, where right from the surface it carried free gold ores, and at the same time the gulches in the immediate neighborhood that received the wash from these mines did not produce one cent's worth of gold. I do not know whether that would be an exception. I have had that experience in Lake and Chaffee counties; have had no experience in Utah, Montana, or Nevada. It does not always follow that placer deposits are generally found adjoining the free gold. I do not consider the rock on that hill as wash rock. When I find rock that is square, with sharp corners, I consider that it has been caused by the upheaval and the breaking up. I do not say that the shafts on the Pinnacle and Crown Point lodes show gravel and boulders to the depth of over one hundred feet. I never have seen any wash or gravel. I have never been down these shafts, but I have examined the dump, and the rock was all square. I mean to say that the dirt on the dump that they have taken out of the shafts, except at the very surface, where it is acted upon by the action of waters melting and running there, that the balance of the rock is square and sharp, and not scored or rounded, as in wash; they are there as originally placed.

Redirect:

The Wells and Moyer placer takes in a very small proportion of the Eureka Gulch, just at the mouth of it, where it comes down from the hill, and that is what is called a dry gulch.

CHARLES G. ARNOLD, being first duly sworn on the part of the defendants, testified as follows:

I reside in Leadville; have been there twenty-two years and over; my business is mining. I have been for the most part since my residence in Lake county engaged in placer mining, principally in California Gulch—the full length of it; from Oro City down. I am acquainted with Rock Hill, in California Mining District. I have been acquainted with it practically since my residence in that section. I know it very well. I am acquainted with the claim on that hill known as the Ora La Plata. I have known of it since 1877. I have been aware of the existence of carbonate deposits of rock in place on Rock Hill since 1876. I am acquainted with that part of Rock Hill that is embraced within the boundaries of the Wells & Moyer placer—substantially. There is not over five or eight per cent. of this placer that is good for placer purposes; the rest is not. That portion located in California Gulch between the slopes of the hill is all that is good for placer purposes—down in the bed of
166 the gulch. California Gulch, as it leaves Oro City, narrows as it comes down until it passes the Rock mine, and for a thousand feet below. The sides of the hills are very steep, sir, as it narrows down. The average elevation of the bed rock—I should think the bed rock was about twelve or fifteen feet, in no place over twenty, from the bottom of the gulch. The bed rock is where the gold ceases—it lays down upon the bed rock. I judge now, from the knowledge I have of the country, I might vary it a little, a few feet, from that. Yes, sir, I have given the depth of the gravel. I first knew of the rock mine in 1876. I knew of this Pennsylvania lode away back in 1873. The character of the mineral that has been taken from the Pennsylvania lode is what we call iron. It carries silver, all carbonate iron—that is what it proved to be. Of course, at that time I didn't know what it was. I knew it was iron. I knew in 1873. That is what we learned afterwards. We hadn't then a knowledge of it. I have known of the existence of the Pinnacle and Crown Point claims since 1877. I have only examined their dumps, I have never been into them. I have had occasion to pass over them. I became acquainted with the Vermont, that is bounded by this place, about the same time, upon the hill. I know nearly the original boundaries of the Wells & Moyer placer claim. Approxi-
mately, they were about one hundred to one hundred and
167 fifty feet wide. Perhaps, to explain it as a miner, I had better say what *our* claims were originally in 1860. We laid them out 100 feet wide for gulch claims. Where the gold extended on the side going up, we called that side claims; 100 feet back of that, hydraulic claims; 200 feet, where the gulch would admit of it, and where we found gold sufficient to lay such claims. Up there

there was only the gulch claims, laid 100 feet wide. If there was a small fraction extending a little over 100 feet, it was always respected as being taken in by whoever took up the claim or purchased it. There were no hydraulic claims taken there. The reason was, that on prospecting on the side hills in little small shafts dug we found no gold. My reason for saying that only about five or seven per cent. of the present Wells & Moyer placer is good for placer mining purposes is because the area that is embraced within that placer is not any larger in proportion than that. The balance of the ground has been prospected by placer men for the purpose of ascertaining that fact. We didn't find any gold—that is, we didn't find any gold that could be worked. You can find almost anywhere in that section of the country a trace of gold, but not much to work. The first knowledge or opinion that this portion of the Wells & Moyer claim was underlaid by carbonate deposits of mineral
168 in rock in place was in 1876—from 1876 on to the present time.

On cross-examination this witness states:

I said approximately that only five to seven per cent. of this claim was, in my opinion, placer ground, meaning by that, that that is the only portion of it which, in my judgment, would pay to placer mine. I mean by placer ground the wash and gravel that contains gold to pay. I don't think either that a man with a shovel and a sluice-box, in which he had about ten inches of water, miner's measure, could placer mine and make it pay. I could not make my grub there. I don't think it exists there outside on that placer. I have found placer gold prospecting there on the western part of the Wells & Moyer patent placer claim, but not, in my judgment, in sufficient quantities to pay to mine. If you pan it you would only get just a trace of gold. I have prospected over the higher portions of this claim on the west side of Eureka and California Gulches and found places of placer gold. I have found it in the iron by pounding it up. It is not often the fact that where you can barely find a trace of gold near the surface you are liable to find large quantities by prospecting it down towards the bed rock, where the bed rock is from 20 to 50 feet below the surface of the ground. I do not say but what there are placer diggings of gravel on the sides of mountains, hundreds and even thousands of feet above the rim rock of the gulches,
169 where you can't get a color near the surface, or where the gold increases as you go down towards bed rock, or that they are not very profitable placer mines. I think that is carried on in California. I don't think you will find it in Colorado. I can't say as to whether there are any such diggings in Idaho or in Montana. I never heard of any except in California, or where there are wash and eruption. I have read of earthquakes shaking up the earth in California. I don't say it has *in* connection with placer mines, but it shows that the crust of the earth has been moved, shaken up, and broken. As to these big diggings I am asked about I have only known of such workings not from experience, but by reading. That is my knowledge where they use powder for blasting, and so on. I

don't know of any instances. It is true we find large diggings or diggings where the gravel is from 25 feet thick from the surface to the bed rock, and where you can't get a color near the surface, and still the diggings pay very well. There are two kinds of diggings. As to that large bank of gravel which you can see in Eureka Gulch, extending back in a westerly direction over that hill, to a certain extent it is of that character; but there are two kinds. I don't think that this placer takes in but a small piece of Eureka Gulch at the bottom close to the gulch. I think that other belongs to the Alexander placer. There is not also placer mining on the
170 Iowa Gulch slope, near the west boundary line of this patented ground. I have never prospected over there. My testimony that only a small per cent. of this Wells and Moyer is placer property is based upon the supposition that it would not pay for me to work it — the process of tailing up. I do not pretend to say that I have sunk shafts over any considerable portion or the whole portion of this placer ground to determine whether or not I could find within a few feet of the bed rock this placer gold. But the proposition is this: We find the iron—we find iron boulders and no indication of any wash for ten feet probably; I mean iron and matter that has rested there for years, and no overlying depth of gravel. As to Eureka Gulch, I know that very well. It is a dry gulch, and I can explain it very well, but I don't wish to argue.

Defendants here offer in evidence papers establishing their chain of title, as follows:

(1.) Patent to the Crown Point and Pinnacle. The title is in a single patent. (2.) Location certificate of the Crown Point. (3.) Deed from the locators to one Meyer of the Crown Point. (4.) Deed from Meyer to Meyer Mining Company of the Crown Point. (5.) Location certificate of Pinnacle. (6.) Deed from Meyer, the locator, to the Meyer Mining Company, which brings both the lodes in the same chain of title. (7.) Deed from the Meyer Mining Com-
171 pany; both lodes to Hallett. (8.) Deed from Hallett to Larson, both lodes. (9.) Deed from Larson to Breene. (10.) Power of attorney from Breene to Thomas. (11.) Deed by Breene through Thomas, attorney-in-fact, to Reynolds, the present defendant. (12.) Amended location certificate to the Crown Point. (13.) Copy of the agreement of Wells & Moyer. (14.) Copy of the patent to the Oro La Plata claim, showing that the premises in conflict were excepted from the patent to the Ora La Plata, and that the Pinnacle patent took in all the ground in conflict were excepted from the patent to the Oro La Plata, and that the Pinnacle patent took in all the ground in conflict between the two claims.

And here the defendants rested their case in chief.

The plaintiff, in rebuttal, introduced evidence as follows:

Mr. WHYTE, being sworn and examined, testified as follows for the plaintiffs in rebuttal:

I am the manager and superintendent of the Iron Silver Mining Company. I have been so since the first of January of this year.

I was put in charge and possession of the property of this company when I took charge *and possession of the property of this company when I took charge* of its management. We did take actual possession, and have been in actual possession since, of this territory—this portion of the Wells & Moyer placer claim in this case where
172 the defendants have worked it across the boundary lines of the Pinnacle on to the placer. I do not know anything about how far back their actual possession has continued.

On cross-examination the witness states:

Referring to the plan map (Exhibit A), in the upper corner here, where the red workings come over on the Wells & Moyer ground, that was work done by Morrissey and Reynolds, our employes. That was [in] their possession some time late in the spring, April or May. It is in their possession yet. Yes, sir; I simply mean by saying that we took actual possession through the Oro La Plata workings; we broke into them.

CAPT. ROBINSON, being first duly sworn, testified as follows for the plaintiffs, in rebuttal:

My residence is now in Detroit, Michigan. I resided during a portion of the year, during 1878–'79 and 1880, at the mine. I was the manager and superintendent for Messrs. Stevens and Lighter. Those are the properties that are now, I believe, included in the iron mine afterwards deeded to the Iron Mining Company. I had charge of this particular Wells & Moyer placer claim, and this particular portion of it in controversy in this suit, during that time, and traced the lines about it in the fall of 1878. In the winter of 1878 and 1879 we had a considerable portion of the timber cut from it.
173 There was then no question that I am aware of about the rights of Stevens and Lighter to the possession of it.

And here plaintiffs rested their case in rebuttal.
And this was all the evidence offered in the case.

And thereupon the defendants, by their counsel, requested the court to instruct the jury as follows, to wit:

1. A patent to a placer claim does not pass title to any vein or lode then known or claimed to exist.

But the court refused to give the jury said instruction; to which the defendants then and there excepted.

2. If the Pinnacle and Crown Point lodes, or their vein upon which it is alleged defendants have followed into the ground of the Wells & Moyer placer, were known at time of issue of Wells & Moyer patsnt, then the vein was not granted in (or was excepted from) the Wells & Moyer patent, & the pl'ff is not entitled to recover.

174 But the court refused to give the jury said instruction; to which the defendants then and there excepted.

3. The pl'ffs have declared for the whole Wells & Moyer placer. Their deed from the patentees conveys only certain divided portions of it, & not so described as to enable the jury in any event to find a verdict showing what part of it is conveyed & what is excepted.

The court permitted the plaintiff to amend its complaint to cover the point raised by said instruction, and refused to give the same; to which the defendants then and there excepted.

4. The pl'ff must recover on strength of his own title. If the vein is not conveyed to pl'ffs by the placer patent under which they claim, then it makes no difference whether def'ts have any title or not; the pl'ffs cannot recover on the weakness of def'ts' title.

But the court refused to give said instruction; to which the defendants then and there excepted.

5. If the jury believe from the evidence that the plaintiff's grantors, at the time of the locations and entry of the Wells & Moyer placer claim, knew or had reason to presume that underneath it was
175 a deposit or vein of ore carrying precious metals in rock in place, then the same was specially excepted from the grant of their patent, and never was the property of the plaintiff or any of its grantors, having been excluded from the grant of the Government; no trespass can be committed thereon as against the plaintiff, and they cannot recover, and if the vein upon which the trespass is alleged was the vein so known, then plaintiff cannot recover.

But the court refused to give said instruction; to which the defendants then and there excepted.

6. It was not the intention of the Federal Government to permit owners of placer mining claims to obtain title to known lodes or veins of mineral ore by embracing the same in applications for patents to such placer claims unless specially designated as lode veins in such applications. The exceptions in a patent are to be construed most strongly against the patentees, and the exception includes not only lodes known, but also those claimed to exist within the placer at the date of the patent; if, therefore, you believe from the evidence that the lode deposit within the boundaries of the Wells & Moyer placer claims was known, or upon valid and subsisting grounds was claimed to exist therein at time of application, entry, or date of patent, then whether it is the property of the defendants or of
176 the Government is immaterial, for in either event there has been no ousting or injury to the plaintiff as to its property, and you should find for the defendants.

But the court refused to give said instruction; to which the defendants then and there excepted.

And thereupon the court gave the jury the following instruction, of its own motion, to wit:

The evidence tends to prove that the lode in controversy was known to Wells & Moyer, grantees of the United States, at the time they made application for the placer patent under which plaintiff

claims title. Also that Wm. H. Stevens, one of the grantees of Wells & Moyer, and a grantor of plaintiff, knew of the existence of the lode at the time application was made by Wells and Moyer for the placer patent, [and] procured such application to be made with a view to acquiring title to himself and his associates to the territory described, and probably with a view and intention to acquire title to the lode now in dispute in this action. Assuming the placer patent to have been obtained with knowledge and intention on the part of the patentees as stated, the question is, whether any right or in-
177 terest in the lode in controversy was conveyed by the patent. That is a question of some difficulty when presented by or on behalf of one who has shown some right or interest in the lode or an intention to claim the same according to local law and the acts of Congress.

But here the defendants show no title or right in the lode at the place in controversy. They assume the right to follow the lode on its dip without the side line of the Pinnacle location and under the Wells and Moyer placer location, so that it is essential that they have the top and apex of the lode within their location in the general direction of the location. A small segment of the top and apex of the lode is shown within the Crown Point location, but it extends, not with the length of the location, but across it, so as to convert the side lines of the claim into end lines, and to limit the direction in which it may be pursued to the space enclosed by those lines. The place in controversy is not within the side lines of either of defendants' location nor within the extension of those lines. No other ground is perceived upon which def'ts may assert title or right of possession to the place in controversy, and therefore they are to be regarded as naked intruders; and as to such intruders the plaintiff's placer title may give a right of possession and recovery.
178 The jury is advised to find for plaintiff with the value of the ore removed from the placer around by defendants.

To the giving of which said instructions by the court the defendants, by their counsel, then and there excepted.

And thereupon the jury returned a verdict for the plaintiff.

And thereupon the defendants filed their motion for a new trial, which said motion is in words and figures following, to wit:

In the Circuit Court for the United States, Eighth Judicial Circuit, District of Colorado.

THE IRON SILVER MINING COMPANY
vs.
JOSEPH REYNOLDS *et al.*
} No. 1524.

Now comes the defendants, by Morrison & Wenzell and Patterson & Thomas, their attorneys, and move the court to set aside the verdict hereinbefore rendered, and to grant the defendants a new trial of the issues therein involved, upon the following grounds, to wit:

179 First. The court erred in permitting the plaintiff to amend its complaint, after the said cause had gone to the jury, without showing some cause therefor, as required by the statute in such case made and provided.

Second. The court erred in admitting incompetent testimony to the jury on the part of the plaintiff over the objections of the defendants.

Third. The court erred in giving to the jury, of its own motion, the following instructions:

"Assuming the placer patent to have been obtained with knowledge and intention on the part of the patentees, as stated, the question is whether any right or interest in the lode in controversy was conveyed by the patent. That is a question of some difficulty when presented by or on behalf of one who has shown some right or interest in the lode or an intention to claim the same according to local law and the acts of Congress. But here the defendants show no title or right in the lode at the place in controversy. They assume the right to follow the lode on its dip without the side lines of the Pinnacle location and under the Wells and Moyer placer location. To that it is essential that they have the top and apex of the lode within their location in the general direction of the location.

180 "A small segment of the top and apex of the lode is shown within the Crown Point location, but it extends not with the length of the location, but across it, so as to convert the side lines of the claim into end lines, and to limit the direction in which it may be pursued to the space enclosed by those lines. The place in controversy is not within the side lines of either of defendants' locations, nor within the extension of those lines.

"No other ground is perceived upon which defendants may assert title or right of possession to the place in controversy, and therefore they are to be recorded as naked intruders, and as to such intruders the plaintiff's placer title may give a right of possession and of recovery.

"The jury is advised to find for plaintiff, with the value of the ore removed from the placer ground by defendants."

Fourth. The court erred in refusing to give to the jury the instructions asked for by the defendants, and each and every of them.

Fifth. Because the said verdict is contrary to the law and to the weight of evidence, and for other good and sufficient reasons appearing in the record of said case.

(S'g'd) MORRISON & WENZELL AND
PATTERSON & THOMAS,
Counsel for Defendants.

181 But the court overruled said motion, and gave judgment on the verdict of the jury for the plaintiffs and against the defendants.

To which action of the court in so overruling said motion and giving judgment, as aforesaid, the defendants, by their counsel, then and there excepted.

And forasmuch as the matters and things hereinabove set forth

do not fully appear of record, the defendants tender this their bill of exceptions, and pray that the same may be signed and sealed by the judge of said court, and thereby become a part of the records, according to the statute in such cases made and provided, which is accordingly done this 14 day of January, A. D. 1884.

(S'g'd) MOSES HALLETT, [L. S.]
District Judge.

182 [Endorsed:] 1524. The Iron Silver Min'g Co. *vs.* Joseph Reynolds and J. D. Morrissey. Bill of exceptions. Filed Jan. 14, 1885. (S'g'd) Edward F. Bishop, clerk.

And the said assignment of errors is in words and figures as follows, to wit:

Assignment of Errors.

UNITED STATES OF AMERICA, *ss:*

In the Supreme Court.

JOSEPH REYNOLDS *et al.*, Plaintiffs in Error,
vs.
THE IRON SILVER MINING COMPANY, Defendant in Error. } No. ——.

183 The plaintiffs in error now come and say that in the record of the proceedings in this cause there is manifest error, in this, to wit:

First. The court below erred in sustaining the objection of the defendant in error to interrogatory put to witness Freeland, as follows:

"Now, are any of these workings by which you approach from the mouth of the La Plata tunnel to the point of intersection—are any of them what are called properly placer workings, or are they what are called lode-mining workings?"

Second. The court below erred in refusing to give the jury the first instruction asked for by the plaintiffs in error, to wit:

"A patent to a placer claim does not pass title to any vein or lode then known or claimed to exist."

Third. The court below erred in not giving to the jury the second instruction asked for by plaintiffs in error, to wit:

"If the Pinnacle and Crown Point lodes, or their vein upon which it is alleged defendants have followed into the ground of the Wells & Moyer placer, were known at time of issue of Wells & Moyer patent, then the vein was not granted in (or was excepted from)
184 the Wells & Moyer patent, and the plaintiff is not entitled to recover."

Fourth. The court below erred in refusing to give the jury the third instruction asked for by the plaintiffs in error, to wit:

"The plaintiffs have declared for the whole Wells & Moyer placer. Their deed from the patentees conveys only certain divided portions of it, and not so described as to enable the jury in any event to find a verdict showing what part of it is conveyed and what is excepted."

Fifth. The court below erred in refusing to give to the jury the fourth instruction asked for by the plaintiffs in error, to wit:

"The plaintiff must recover on strength of his own title. If the vein is not conveyed to plaintiff by the placer patent under which they claim, then it makes no difference whether defendants have any title or not; the plaintiff cannot recover on the weakness of defendant's title."

Sixth. The court below erred in refusing to give to the jury the fifth instruction asked for by the plaintiff in error, to wit:

"If the jury believe from the evidence that the plaintiffs' grantors at the time of the locations and entry of the Wells & Moyer placer claim knew, or had reason to presume, that underneath it was
185 a deposit or vein of ore carrying precious metal in rock in place, then the same was specially excepted from the grant of their patent, and never was the property of the plaintiff or any of its grantors; having been excluded from the grant of the government, no trespass can be committed thereon as against the plaintiff and they cannot recover; and if the vein upon which the trespass is alleged was the vein so known, then plaintiffs cannot recover."

Seventh. The court below erred in refusing to give to the jury the sixth instruction asked for by the plaintiffs in error, to wit:

"It was not the intention of the Federal Government to permit owners of placer-mining claims to obtain title to known lodes or veins of mineral ore by embracing the same in applications for patents to such placer claims unless specially designated as lode veins in such applications. The exceptions in a patent are to be construed most strongly against the patentees, and the exception — not only lodes known but also those claimed to exist within the placer at the date of the patent; if, therefore, you believe from the evidence that the lode deposit within the boundaries of the Wells & Moyer placer claim was known, or upon valid and subsisting grounds was claimed to exist therein at time of application, entry, or date of patent, then whether it is the property of the defendants or of
186 the Government is immaterial, for in either event there has been no ousting or injury to the plaintiff as to its property, and you should find for the defendants."

Eighth. The court below erred in giving to the jury the following instructions, to wit:

"The evidence tends to prove that the lode in controversy was known to Wells & Moyer, grantees of the United States, at the time they made application for the placer patent under which plaintiff claims title; also that William H. Stevens, one of the grantees of Wells & Moyer, and a grantor of plaintiff, knew of the existence of the lode at the time application was made by Wells & Moyer for the placer patent, procured such application to be made with a view to acquiring title to himself and his associates to the territory described, and probably with a view and intention to acquire title to the lode now in dispute in this action. Assuming the placer patent to have been obtained with knowledge and intention on the part of the patentees as stated, the question is whether any right or interest in the lode in controversy was conveyed by the patent. That is a

question of some difficulty when presented by or on behalf of one who has shown some right or interest in the lode, or an intention to claim the same according to local law and the acts of Congress.

But here the defendants show no title or right in the lode at
187 the place in controversy. They assume the right to follow the lode on its dip without the side line of the Pinnacle location and under the Wells & Moyer placer location. To that it is essential that they have the top and apex of the lode within their location in the general direction of the location. A small segment of the top and apex of the lode is shown within the Crown Point location, but it extends not with the length of the location, but across it, so as to convert the side lines of the claim into end lines and to limit the direction in which it may be pursued to the space enclosed by those lines. The place in controversy is not within the side lines or either of defendants' locations; not within the extension of those lines. No other ground is perceived upon which defendants may assert title or right of possession to the place in controversy, and therefore they are to be regarded as naked intruders, and as to such intruders the plaintiff's placer title may give a right of possession and recovery.

The jury is advised to find for plantiff, with the value of the ore removed from the placer ground & by defendants."

Ninth. The court below erred in overruling the motion of the plaintiffs in error for a new trial and giving judgment on said verdict.

Wherefore, and by reason of the said errors, the plaintiffs
188 in error pray that the said judgment may be wholly set aside, reversed, annulled, and for naught held, and that the said plaintiffs in error may be restored to their rights in the premises in every manner and respect as though the said judgment had not been rendered.

By —— —— AND
—— ——,
Their Attorneys.

UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

I, Edward F. Bishop, clerk of the circuit court of the United States for the District of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the record and proceedings heretofore had and entered of record and filed in said court, and in a certain cause lately in said court pending, wherein the Iron Silver Mining Company was plaintiff and Joseph Reynolds *et al.* were defendants, as fully and completely as the same still remain on file or of record in my office.

In testimony to the above, I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 17th day of March, A. D 1885.

[Seal of the United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk.*
By ——, *Deputy Clerk.*

[Endorsed:] 1524. In the Supreme Court of the United States. Joseph Reynolds *et al.*, pl'ffs in error, *vs.* The Iron Silver Mining Co., def't in error. Assignment of error. Filed Jan'y 14, 1885. S'g'd Edward F. Bishop, clerk. Morrison & Wenzell and Patterson & Thomas, attorneys for pl'ffs in error.

Cost of transcript, 504 fol's & cer., $50.75. Paid by pl'ffs in error.

Endorsed on cover: Colorado C. C. U. S. No. 1304. Joseph Reynolds and John D. Morrisey, pl'ffs in error, *vs.* The Iron Silver Mining Company. Filed April 16, 1885.

116-687

SUPREME COURT

OF THE

UNITED STATES

October Term, 1885.

JOSEPH REYNOLDS AND JOHN D. MORRIESY,
Plaintiffs in Error,

vs.

THE IRON SILVER MINING COMPANY,
Defendant in Error.

Crown Point & Pinnacle Lode Claims,

vs.

Wells & Moyer Placer Claim.

Error to the Circuit Court of the United States for the District of Colorado.

Brief and Argument of Plaintiffs in Error.

T. M. PATTERSON,
C. S. THOMAS,
Attorneys for Plaintiffs in Error.

DENVER, COLORADO:
C. J. KELLY, PRINTER, 406 HOLLADAY STREET.
1885.

SUPREME COURT

OF THE

UNITED STATES

October Term, 1885.

JOSEPH REYNOLDS AND JOHN D. MORRIESY,
Plaintiffs in Error,

vs.

THE IRON SILVER MINING COMPANY,
Defendant in Error.

Crown Point & Pinnacle Lode Claims,

vs.

Wells & Moyer Placer Claim.

Error to the Circuit Court of the United States for the District of Colorado.

Brief and Argument of Plaintiffs in Error.

Statement of the Case.

On the 7th day of May, 1884, defendant in error filed its complaint in ejectment against the plaintiffs in error, alleging an ouster by plaintiffs in error, from its possession of a tract of mining ground, known as the Wells & Moyer placer claim, the fee simple title to which it claimed to hold. The plaintiffs in error on the 7th day of October, 1884, filed their answer, denying the allegations of the complaint, and setting up two affirmative defenses to the action.

The first alleges that Joseph Reynolds was the owner in fee, of the Crown Point and Pinnacle lode mining claims, adjoining the said Wells & Moyer placer claim, the veins and lodes in which dip underneath and into said Wells & Moyer placer claim, and that the supposed trespasses of the plaintiffs in error, consisted in following said veins or lodes on their dip into said placer claim. The second affirmative defense is, that at the time of the survey, entry and patenting of the Wells & Moyer placer claim, a lode or vein of mineral ore called the Pinnacle, and a lode or vein or deposit carrying like minerals of great value, were known and claimed to exist within the boundaries thereof, which fact was known to the patentees of said placer claim, at the times mentioned, and were not included in the application for patent thereof, but on the contrary, were expressly excluded from the grant made by said patent. That in such patent it was expressly reserved that the premises conveyed might be entered by the proprietor of any such vein or lode, for the purpose of extracting and removing the ore therefrom should the same, or any part thereof, be found to penetrate, intersect, pass through or dip into the premises by such patent granted. That the Crown Point and Pinnacle veins or lodes were and had been at said times duly discovered located and of record by such names, with surface ground adjoining the exterior surface of said placer claim, and that the vein or veins in said lode claim then known to exist, afterwards and before the commencement of this suit, became the property in fee of the plaintiff in error, Joseph Reynolds, and that said vein or veins upon their dip come underneath the exterior lines of said placer claim, and that Reynolds as owner and proprietor, and Morrisey as his licensee, entered upon and followed said veins underneath said exterior surface lines, and not otherwise; which said entry is the only entry or ouster of the defendant in error.

On the 7th day of November, A. D., 1884, the defendant in error filed its replication joining issue on said

affirmative answer. The cause was tried on the 18th and 19th days of that month, resulting in a verdict for the defendant in error, under the instructions of the court.

The evidence introduced on the part of the plaintiffs in error is somewhat voluminous, and will be referred to at some length in the argument. It tended to prove and we think did conclusively establish the existence of the facts constituting our affirmative defenses, thereby entitling us to a verdict and judgment on the merits.

The motion for new trial was overruled, and judgment rendered upon the verdict on the 29th day of December, 1884, and by stipulation duly executed between counsel, pursuant to a condition in the order overruling the motion for new trial, the case is to be submitted for decision under the twentieth rule of this Court.

Specification of Errors.

Of the nine errors assigned, we rely upon all save the first, which is immaterial, and one which this Court would probably not notice in any event. Those to be urged and asserted in the argument are all, save the last, based upon the action of the court in giving and refusing to give instructions to the jury.

The plaintiffs in error requested the court to instruct the jury that "a patent to a placer claim does not pass title to any vein or lode then known or claimed to exist." Its refusal to do so, constitutes our second assignment of error.

They also asked the court to instruct the jury that "if the Pinnacle and Crown point lodes, or their veins upon which it is alleged defendants have followed into the ground of the Wells & Moyer placer, were known at the time of issue of Wells & Moyer patent, then the vein was not granted in (or was excepted from) the Wells & Moyer patent, and the plaintiff is not entitled to recover." The refusal to give this instruction is made the third assignment of error.

together with all costs of proceedings; and where a vein or lode such as is decribed in section twenty-three hundred and twenty is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of the vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

Section 2320 reads as follows:

"Mining claims *upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits*, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations and laws in force at the date of their location. A mining claim located after the 10th day of May, A. D. 1872, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except when adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end lines of each claim shall be parallel to each other."

We have italicised that part of the last foregoing section to which we believe reference is made by section 2333, that being the only portion thereof in which a vein or lode is described. We shall endeavor to show that it was the purpose and object of Congress, in providing for the issue of placer patents, to limit all grants so made to placer deposits proper, and to such unknown vein or lode deposits as subsequent development or discovery may prove them to contain; and that if any vein, lode or deposit of mineral in rock in place is known or claimed to exist within the boundaries of the placer claim at the time application is

made for a patent thereto, such lode, vein or deposit does not, and was never intended to pass by such patent, but the same is as much open to location as a lode claim, subject only to the right of the grantee of the Government in the soil and placer deposit, as though no placer patent to the premises had ever issued. We shall, we think, be able also to maintain that this has always been the construction heretofore given to the section under consideration, and that any other construction would overthrow and destroy the intent and object of Congress in limiting the dimensions of lode claims to such a narrow compass, while, at the same time, it permits such comparatively large tracts of territory to be embraced within patents for placer locations.

For the purpose of more effectually presenting our views upon the above proposition, it may be well to call the attention of the Court to the first two exceptions contained in the patent of the defendant in error to the premises in controversy, and which are inserted in all placer patents by the Government. They are of importance, both as defining the extent of the grant actually made to the grantors of the Iron-Silver Mining Company, and also as showing the uniform and undeviating construction given by the Interior Department to section 2333 of the Federal Statutes, from May 10th, 1872, down to the present time. They are:

"*First*—That the grant hereby made is restricted in its exterior limits to the boundaries of the said lot No. 281, as hereinbefore described, and to any veins or lodes of quartz, or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits, which may hereafter be discovered within said limits, and which are not claimed or known to exist at the date hereof."

"*Second*—Should any vein or lode of quartz, or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits, be claimed or known to exist within the above described premises at the date

hereof, the same is expressly excepted and excluded from these presents."

A careful analysis of section 2333 of the Revised Statutes of the United States shows that it was intended to provide for three conditions :

First—The duty devolving upon the owner of a placer claim who knows that within its limits is a lode, vein or deposit of mineral in rock in place.

Second—The effect and consequence of a failure to apply for and patent that deposit as a lode claim, as therein provided ; and

Third—The extent of a grant by placer patent as to unknown lodes or veins in rock in place.

The fact that special provision is made in this section for the method of patenting lodes within placer claims, of the consequences of a disregard of such provision, and of the extent of a placer patent as to unknown lodes or veins, is of itself an unanswerable argument that Congress never intended to permit individuals or corporations to include within patents for placer claims any deposits other than those usually included within and expressed by the latter denomination. This view is strengthened by the fact that after making ample provisions for the location and patenting of lodes, veins and deposits in rock in place, it is provided by section 2329, that "*Claims usually called placers, including all forms of deposit except veins of quartz or other rock in place shall be* subject to entry and patent," etc. A clear and unmistakable distinction appearing throughout the act, between the two forms of deposit, can it be said that it was ever intended that the owner of a placer claim, knowing that it contains a lode or vein, can acquire title to the latter in violation of the terms of the law which requires that separate application shall be made therefor? Now, by the record in this cause it is charged by the answer and admitted by the evidence that at the time the plaintiff's grantors located and made application for patent

to the placer claim in question, they knew that a lode or deposit in rock in place existed within the boundaries thereof, and that their object in locating the placer was to possess themselves of the lode, and that the work done upon the placer was for the purpose of developing the lode deposit and not the placer. These facts existing, section 2333 provides emphatically that the application shall be made for the placer claim with the statement that it includes such vein or lode, in which case the latter shall be paid for at the rate of five dollars per acre, with twenty-five feet of surface on each side thereof. It is not pretended that this was done by the plaintiffs' grantors. They ignored the mandate of the statute, and yet claim that they are entitled to the lode in question, because, forsooth, it was not located as a lode *claim* by some third party at the time the patent was applied for. Yet the same section of the statutes provides emphatically that when such a vein or lode is known to exist, an application for a patent for such placer claim which does not include an application for the vein or lode claim, *shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim.*

Does this mean what its terms express, or does it mean that the Government intended only to protect the vested rights of outsiders without meaning to reserve anything to itself? In other words, are the rights of some other citizen to attach to a vein within a placer claim by actually locating it before the clause last cited from the statute becomes operative, or did Congress mean to exclude all known veins from the grant of placer patents, as in terms it provides? And is not the latter intention made irrefutable by this modifying clause last which follows, and which provides, "*but where the existence of a vein or lode in a placer claim is not known*, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof?" If the learned counsel

for the Iron-Silver Mining Company can define the office of this proviso on any hypothesis other than that for which we contend, we will confess ourselves at fault in the construction to be given to the section.

The answer in this case alleges, and the replication denies, that the grantors of the defendant in error knew, not only at the time of its location, but when they applied for and received a patent to the Wells & Moyer placer claim, that there existed within its boundaries a lode vein or deposit of mineral ore in rock in place, carrying silver, lead and other precious metals; and that the grantors of the plaintiffs in error had, prior thereto, located the Crown Point and Pinnacle lode claims thereupon and adjoining the surface boundaries of what was afterwards located as the placer claim.

Issue was joined upon these facts in unmistakable terms, and the testimony is conclusive as to the facts. The testimony of Page, Bulkley, Chanute, Evans, Deuter, Leonhardy and Arnold shows that with the exception of an acre or two of ground directly within California Gulch, the ground embraced within the exterior boundaries of the Wells & Moyer placer claim is utterly worthless for placer purposes; while the testimony of Deuter, Evans, Arnold Leonhardy and Baldwin shows that Wells & Moyer were mere figure-heads for Stevens & Leiter in applying for and obtaining patent to the placer claim, the latter paying the expenses of the application and survey, and intending by the patent to acquire an extensive tract of territory underlaid by a rich carbonate deposit, which all of them knew at the time to be there.

The testimony of these witnesses further shows that the grantors of the defendant in error stated at different times that their object in securing the patent was to obtain the mineral deposit referred to, and that Wells & Moyer were used for the purpose because of the personal unpopularity of Stevens & Leiter, and of the certainty of opposi-

tion which an application for patent in their names would inevitably engender.

It further appears by the testimony of the witnesses named, and of J. R. Loker and Charles A. York, that the Wells & Moyer was practically surrounded by lode locations at the time it applied for patent, many of which extended themselves within the boundaries of the placer claim, which that testimony and the location certificates of the Crown Point and Pinnacle claims show that the two mines last named were discovered and located long prior to any location or pretended discovery of a placer deposit within the Wells & Moyer claim. This testimony is conclusive, since it is wholly uncontradicted, and completely establishes the issues raised by the affirmative answer of the plaintiff in error.

It was not only "claimed" but "known," not only to the district in general, but to the grantors of the Iron-Silver Mining Company in particular, at the time of the location, the application for patent and the entry of the Wells & Moyer claim, that a "vein or lode of quartz or other rock in place bearing—silver and lead—existed within the limits thereof," and was by express terms excluded from the grant of said patent. They also knew, as appears from the testimony of Deuter, Baldwin and Leonhardy, that the deposit in place within said boundaries, entered from a westerly direction, that is to say, from the Crown Point and Pinnacle lode claims.

Having by its replication denied that its grantors knew, when they applied for a patent to the Wells & Moyer placer claim, that there existed within its boundaries the lode or deposit which the plaintiffs in error subsequently located, and that the veins, lodes or deposits in the Crown Point and Pinnacle lode claims enter into and underneath the Wells & Moyer placer claim in their course downward, and the testimony as to these issues being entirely against it and uncontradicted, the Iron-Silver Mining Company can-

not now avoid the effect of the "conclusive declaration" resulting from the failure to state in such application the existence of such lode or deposit, and paying for it as the section requires. It is estopped by the acts of its grantors from claiming or possessing itself of such veins or deposits, and the fact that the surface boundaries of the Crown Point and Pinnacle are outside of the placer patent is, we submit, wholly immaterial.

The only case of which we are aware, which has before presented a question similar to the one under consideration, is the Iron-Silver Mining Company vs. Sullivan et.al., 5 McCrary 274, and inasmuch as it will be quoted by defendant in error, we must here refer to it. The case is not in point, for the reason that it was a dispute between the Iron-Silver Mining Company based upon the identical placer claim in dispute here and the locators of a lode claim *subsequent to the issuing of the placer patent and embracing a portion of the surface* included within such patent. Notwithstanding the disparity between the facts in that case and the one at bar, however, we do not believe that the opinion of the learned Judge in that case, will bear the test of a careful analysis. It was brought to this Court on writ of error, but the precise question determined below was only passed upon indirectly since it was reversed upon a question of pleading.

109 U. S. 550.

This decision does, in our our judgment, practically determine against the position of the court below, since it is declared "that in an action by the patentee of a placer claim to recover possession of a vein or lode within its boundaries, an answer alleging that the vein or lode was known to the patentee to exist at the time of applying for the patent, and was not included within his application, well pleads the facts which under section 2333 of the Revised Statutes, *precludes him from having any right of possession of the vein or lode*."

This is declaring virtually that an answer containing such

a statement presents a defense, which, if proved, should constitue a bar to the action; in other words, that such knowledge makes operative the exceptions contained within the patent, and defeats any claim which the patentee or his grantee may make to the vein or lode within the limits of his placer claim, either as against a subsequent locator within the boundaries thereof, or a prior locator adjoining, and whose vein enters beneath the disputed premises. We shall refer to this decision in another part of the argument. We make our criticisms of the decision of the Judge of the court below, with due regard to the importance which always attaches to his judicial utterances, but with confidence derived, not more from the nature of the question itself, than from the grave doubts as to its correctness, as expressed by the learned Judge himself. His opinions are entitled to very great weight, and justly commands universal respect. They have the merit of a logical basis and of representing the result of deep reflection and cautious judgment. But, in this instance, we most respectfully submit that the learned Judge, by committing the error of confounding all distinctions between *lodes or veins*, as such, on the one hand, and *claims located on lodes and veins* on the other, as a premise to his argument, of necessity reached a conclusion at variance with the intention of the law-maker and with the plain meaning of the language employed in framing the section. Admitting the difficulty of the problem presented, he gives his decision with expessed misgivings as to its correctness, and ends by saying that "the question is somewhat doubtful, and while I shall sustain the demurrer to the answer, I think that before rendering final judgment in these cases * * * counsel had better take this case to the Supreme Court and let the matter be finally settled there."

The opinion decides, in brief, that inasmuch as the word "claim" is used several times in section 2333 in connection with the words "vein or lode," the three must be construed to-

gether, and since a vein or lode claim differs from a vein or lode, inasmuch as it means something located over or upon a vein or lode, and embracing surface ground on either side in addition thereto, it must follow that unless a lode claim be in existence, properly located and defined, at the time of the application for the placer patent, such patent carries with it all veins or lodes within its boundaries, whether known to the applicant or not. Such, we respectfully submit, is not the meaning of the statute.

We have already referred to the fact that such a construction would practically destroy the effect of the statute so far as the interest of the Government in the exclusion is concerned, and that unless some third party, "*some stranger to the application for patent*, had at the time thereof acquired some vested interest in the lode or vein, the reservation mentioned in the statute would become inoperative. This would deny to the Government, under the section in controversy, the right to reserve for itself lodes or veins which it could reserve for any of its citizens. It would take away from Congress the power to segregate a lode or vein from the operation of a placer patent, notwithstanding the statute, save for a condition of things which would result in depriving the Government in any event from the enjoyment or possession of the thing excepted. That the reservation or exception was not intended to operate save in favor of vested rights in other individuals, is apparent from four considerations:

First—Provision is made in and by other sections of the statute for the preservation of the rights of third persons as against applications for patent to which they are strangers. Section 2326 enacts how and when adverse claims to applications for lode claims shall be filed, and how they shall be disposed of. Section 2329 provides, that placers shall be similarly entered and patented, subject only to such exceptions as the difference between the two classes of deposits necessarily impose. Lest a preclusion of pos-

session or enjoyment should result from a disregard of these provisions concerning the filing and prosecution of adverse claims to applications for placer patents, the Interior Department has required them to be, and they have been filed and prosecuted in the same manner and to the same extent as in applications for lode patents. We believe that lode claims located previous to the application would be *ipso facto* excepted from the placer patent without the necessity of adversing, but such has been the previous course of proceeding.

Second—The first object of section 2333 is to provide for the manner of patenting a placer claim which shall include a vein or lode within it, when the latter is in the possession of and claimed by "*the same* person, association or corporation." When such is the case, the *same person*, etc., must state that the application includes *a vein or lode*, and then, and then only, it is regarded upon such statement as a *vein or lode claim* for the purpose of distinguishing it from the placer; and for the purpose of a patent, the statute does not refer to a "claim" until it recites what shall be included within the placer application. If it were regarded as a claim in the sense of a discovery and location under other sections of the law, it would by the *same person*, as well as by a third person, have to be separately located, discovered, recorded and segregated from the public domain *as such* before it could be either included in or excluded from the patent.

Third—The learned Circuit Judge, in his opinion in this cause, divided section 2333 into four paragraphs, and based his decision chiefly upon a consideration of the third, which, we submit, when properly analyzed, demonstrates almost with the precision of a mathematical problem, that the reservation made by the Government was intended to operate to and for itself, and not for the benefit of lode claims previously located on the same premises by others. Judge McCrary's third paragraph is as follows:

"And when a vein or lode such as is described in section 2320 is known to exist within the boundaries of a placer claim, *an application for a patent for such placer claim which does not include an application for the vein or lode claim*, shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim."

The italics are ours, and we have made them to draw attention to that part of the paragraph which Judge McCrary in his decision did not take into account at all, yet which gives the key to the exact intention of Congress. If by the section it was meant to exclude from the grant of a placer patent only those lode claims which had been discovered and located by third persons previous to the placer application, why the necessity of estopping the grantee in a placer patent from the possession and ownership of lodes or vains *not included by himself within his own application?* For a lode claim belonging to a third person and a stranger cannot be, and is not expected to be, included by the owner of the placer in his application. It could not be, and never was intended to be. It is something which never entered into the contemplation of those who framed this section, whose object is to define *the rights of the placer claimant and the Government solely*, and to reserve lodes and veins not included as lode claims in the same application, which are *ex necessitate* in possession of and claimed by *the same* person, association or corporation. Suppose the Crown Point had been located by the plaintiffs in error when the owners of the Wells & Moyer placer made application for their patent, and covering a part of the same surface, and there had been included within it an application for a patent to the Crown Point; to obtain such patent they would have been compelled to claim the ownership and possesssion of it themselves, since an allegation of title in the plaintiffs in error would have denied them the right to a patent therefor.

Fourth—The statute works an absolute estoppel upon the owner of the placer patent to all title to any vein or lode not included within his application by express statement, though the owner of the placer be also the owner and in possession of the lode or vein. It does not say that the act of the applicant shall amount to a conclusive declaration that he has no right of possession to any vein or lode claim located by some third person, *but to that of which he is himself in possession.* Such identity of possession precludes the idea of a previous location of the lode or vein by an outsider, and the conclusive declaration implies that the title to the lode or vein being still in the Government, it is "free and open to exploration and purchase" thereafter by citizens and those who have declared their intention to become such, under section 2319 of the Federal Statutes.

"Where the existence of the vein is known, but concealed in the application, it is a fraud upon the Government," and such a patent should be set aside, without reference to the claims or rights of third persons.

These reflections justify us in asserting that by section 2333 it was intended that if A, being the owner of a placer claim and in possession of a vein or lode within the boundaries thereof, desired to include said vein or lode in his application for a patent to his placer, and thus prevent third persons from locating or setting up any right to it, he could do so by stating that his application included such vein, whereupon, by paying five dollars per acre for a strip of surface twenty-five feet in width on each side of such vein, his placer patent would include the vein; failing to do which, the vein was excepted from the patent and subject to location by other citizens as fully as though the same laid outside of and beyond the limits of the placer premises.

That by the use of the words "vein or lode," or "vein or lode claim," in section 2333, is not meant a mining

claim 1500 feet in length by 600 or any number of feet in width upon a lode or vein, is equally plain, from equally cogent reasons.

Reference is made by that section to section 2320 for a description of a vein or lode, in the following language:

"And where a vein or lode, such as is described in section 2320, is known to exist within the boundaries of a placer claim," etc, "the application must include an application for the vein or lode claim," etc. Section 2320 contains a description of two things to-wit: mining claims and veins or lodes. The two are essentially and inherently different, and inasmuch as we are expressly referred to one of them only, that one and not the other is the object of our search. The veins or lodes described (not defined) in that section are "of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits," and it is plainly to this that reference is made. The balance of the section has reference to the size, shape and character of claims located and to be located thereon. The Interior Department, to which is entrusted the duty of issuing patents under this law, have long since followed that constuction. Turning back to the exceptions already quoted from the placer patents issued by it, it will be seen that one of them restricts the grant to the surface and to all veins or lodes (not vein or lode claims) of the above desription not known or claimed to exist at the date of the patent, while the other expressly excludes from the grant all veins or lodes (not vein or lode claims) of the above description known or claimed to exist at the date of the patent. This construction also precludes the idea of an intention by Congress to except from its placer grants, only those lode claims which might have been duly located by others, at the date of the placer entry since it makes, or at least attempts to make, the exception operate down to the very date of the patent.

If the term "vein or lode claim," as used in section

2333, be construed to mean a mining claim located upon a vein or lode in Colorado, it must, under the statutes of that State, consist of a piece of ground 1,500 feet in length by 300 feet in width. The section provides that when a vein or lode is in the possession of the same person, etc., who makes application for a patent to a placer claim, which includes the vein, he shall make a statement to that effect in his application, in which case the placer patent shall include such vein or lode, "upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof." This means, under the construction contended for by counsel for defendant in error, that payment should be made at the rate of five dollars per acre for the vein or lode claim, 1500 feet in length by 300 feet in width, together with an additional strip of twenty-five in width on each side, or 350 feet in width in all, which would be an absurdity.

Again, the possessor of a placer claim 160 acres or more in extent, may be in possession of a vein or lode running the entire length of his claim, which he may desire to include in his application for a patent. It may be 1500 feet, or 15,000 feet in length, yet if it is included within the boundaries of the placer he may apply for a patent to the placer with the statement that it includes the vein or lode, and there is nothing in the statute which limits the posessor of the placer patent to a 1,500 foot section of the vein included therein, but on the contrary he may pay and receive a patent for such part of it as is included within the placer claim, regardless of its extent. Yet such is the necessary consequence of the constructions contended for by the learned counsel for the defendant in error.

That a vein or lode claim, duly located, of the length and width permitted by statute, and existing in the name of some individual or association, was not intended by the Act of May 10, 1872, is apparent, as we have already suggested, by a consideration of the last clause of section

2333: "When the existence of a vein or lode in a placer claim *is not known*, a patent for the placer claim shall convey all valuable mineral," etc. Not known to whom? Not known to the applicant or to the community at large, or to some one or more citizens? We take it that it must be an unknown lode, one, the existence of which is within the knowledge of no one, and certainly is not known to the applicant. The record in this case alleges, and it is proven that the existence of the deposit within the boundaries of the Wells & Moyer placer claim, and also within the Crown Point and Pinnacle lode claims, was known to the owners of the Wells & Moyer placer claim at and before the time they applied for a patent. Therefore, it cannot be said that the deposit which we claim is or was an unknown one, and if not, the conclusion is obvious; the patent for the placer claim did not convey it.

The use of the words, "when the existence of a vein or lode in a placer claim is not known," *ipso facto* refutes the idea of the intention of Congress to refer to a lode claim. A *lode claim* cannot exist within a placer claim or elsewhere and be unknown. It is certainly known to the locators thereof, and since in Colorado for the location of a lode claim six boundary stakes are required upon the premises, together with a discovery shaft not less than ten feet deep, and deeper if necessary to show a well defined crevice, together with a certificate of location duly recorded in the office of the recorder of deeds of the proper county, it would be a practical impossibility for the possessor of a placer claim to be unaware of the existence of a lode claim within his boundaries if one had been located. To say that a "vein or lode" as used in this connection means a "vein or lode claim," would be a useless play upon words, giving them no duty to fulfill, no fact to express. How it will be possible, therefore, to uphold the construction given by the court below to this section, we are at a loss to perceive.

We have before adverted to the fact that the second condition inserted by the Interior Department excepts and excludes all veins or lodes known or claimed to exist within the placer premises at the date thereof. The exception and exclusion are absolute. They are something more than a reservation, and, to use the language of Mr. Washburn, stand as though the relations of the parties to the conveyance were reversed, the grantor becoming the grantee.

3 Washburn Real Prop. (3d Ed.,) p. 369, *et seq.*

By the terms of the instrument of conveyance as well as by a proper construction of the law itself, the defendant in error has no claim whatever to the lode, vein or deposit which the plaintiffs in error were following. Having been excluded by the Government from its grant to the placer, the plaintiffs in error had the right to and did follow their lode upon its dip and downward course into and underneath the premises in question, and the defendant in error has no more right to interfere with them or to claim that deposit, than it has to set up title to the Comstock vein of Nevada.

One test for ascertaining whether a given construction be a correct one, is to consider its consequences in connection with the probable object of the law-maker. Taking the entire act of May 10, 1872, and considering it as a whole, it is clear beyond contradiction that the Government of the United States intended thereby to throw its entire mineral domain open to exploration and purchase by its citizens and those who had declared their intention to become such; that a sharp distinction is drawn between lodes and placers, the one being recognized as deposits in place and the other as deposits not in place. That while both are equally open to location, the title to the one can be secured in a comparatively small quantity at five dollars per acre, and to the other in a comparatively large quantity at two dollars and a half per acre. Yet if,

the decision of the court below be sound, individuals, corporations and associations are at perfect liberty to acquire the fee to lode claims in unlimited quantity and at fifty per cent. of what the Government should receive therefor, were the intention and object of the statutes observed and enforced. New and valuable mining districts are, through the energy and restlessness of the prospector, being constantly added to the worlds stock of known producing mines. Under this decision individuals may find upon the hitherto unprospected mineral domain, lode deposits, 1500 by 300 feet of which may contain sufficient metallic wealth to exhaust cupidity. Yet, for the purpose of monopolizing all that exists of the deposit, vast tracts may be located and surveyed as placer claims, and the locators thereof, with the full knowledgs of the existence thereof, and for the sole purpose of securing it, and conscious of the worthlessness of the placer location as *such*, may perpetrate a deliberate fraud upon the Government, and an equally great wrong upon other citizens, and outrage the very object and purpose of the statute, by applying for and securing a patent thereto. Then, in the very face of the exceptions expressed in and by such patent, the holder thereof may say to the subsequent locator of part of the deposit, "it is true that both you and I knew of the existence of the lode when the placer was located and patent applied for; it is true that I did not accompany such application with the statement that it contained the lode; it is true that by not thus including it within my application I have conclusively declared that I have no right of possession thereto; nevertheless, since you did not at the time of my application have a located and recorded lode claim within the limits of my placer, you cannot have it now. It is mine though it has cost me but two and a half dollars per acre. It is mine by the principle of statutory construction, and no power save that of the Government itself can take it from me." Such a consequence was never intended. Senator Cole, of Cali-

fornia, in the debate which preceded the passage of the act itself, called the attention of the Senate to the necessity of preventing by appropriate legislation just such things as are possible to occur if our view of this statute be erroneous. (See Cong. Globe, 42d Congress, p. 2459.) On June 19th, 1866, Senator Stewart, of Nevada, in discussing the draft of the first mining law ever passed by the National Legislature, shows clearly what the policy of the Government should be, and was intended to be, in throwing open the public mineral domain to exploration. Such a policy as that which must result from this decision, if affirmed, could find no place in the plan which formed the groundwork of the entire mining statutes, to-wit: the laws and customs of the miners of the West.

We are aware that great stress will be laid by our learned opponents upon the fact that the late Honorable Secretary of the Interior has decided on several occasions that protests or adverses will not be entertained on behalf of claimants of lodes located within placer claims subsequent to application for patent to the latter. These decisions, we submit, have nothing to do with the question presented by this record. Did the Secretary decide that by the terms of section 2333, a placer patent carried to the patentee everything upon and within the claim not adversly located prior to patent, his opinion would be entitled to the weight always given to department construction, and such a decision by Secretary Teller would undoubtedly receive very great consideration. As we understand them, however, his decisions are, that post claimants have no right to protest in his Department, nor have they under the law. He sees very clearly that since by the terms of the placer patents, based on section 2333, the lodes or veins, if known to exist, do not pass at all, there is no need for entertaining protests, since the title being reserved to the Government, the courts are open to citizens for a settlement of the ques-

tion of the knowledge of the existence thereof at the times mentioned in the section.

We have repeatedly referred to the requirements of the first portion of section 2333. Apologizing for making one more reference thereto, we call attention to the fact that the Government, in disposing of its public domain, whether agricultural or mineral, invariably requires that the claimant shall give notice to the world by publication of his intention to make entry, so that all persons may have opportunity, if they so desire, to come in and contest the entry of the premises. It is for this purpose, among others, that the claimant of a placer claim containing a vein or lode is required to to make a statement of the existence of the latter in his application for patent to the former, in order that publication of the claim to the lode can be made in connection with the claim to the placer, and then should outsiders desire to contest the right to the lode so embraced within the placer, opportunity could be given them so to do. If the owner of a placer can obtain title to a vein or lode known to exist within its limits without making such statement, then it is the only instance in which some specific part of and interest in the public domain can be acquired without advertisement, and consequent opportunity to adverse claimants thereto to protect or to attempt to protect their claims.

Nor does the exclusion of a known lode or deposit in place result negatively as the consequence of the omission of the applicant, but affirmatively; so that the exception is itself unmistakable. "An application for a patent for such placer claim which does not include an application for the vein or lode claim, *shall be construed as a conclusive declaration* that the claimant of the placer claim has no right to the possession of the vein or lode claim." This conclusive declaration cannot be modified by any mistake or unintentional failure of the applicant to comply with the positive mandate of the statute. And the declaration of no right

of possession, must be absolute to the Government, to third persons as claimants and to the public in general. Language could not be broader or more sweeping in its scope and effect than this; the knowledge of the existence of the lode or vein, being the test of its ownership.

It may be urged against our construction of the section under consideration that the exception inserted in these patents of known veins or lodes might become as broad, if not broader than the grant itself, and therefore repugnant to the familiar rule that exceptions or reservations of that character are inconsistent with the grant and therefore void. In this case, however, the exception results from the positive provisions of a statute prescribing the method of acquiring and defining the extent of a grant by the Government, of a certain class of mineral lands. The grant therefore, if taken at all, must be taken with such modifications and restrictions as the granting power has declared and provided. In fact Congress, in our judgment, deliberately intended that whenever placer claimants should decieve the Government, by concealing the existence of veins or lodes within the limits of their claims, or whenever patents should be obtained from the Government, ostensibly for placers, but really for lodes, such grants should be void to the extent of the exceptions, notwithstanding the result might be to vitiate the patent *in toto.* Such a consequence ought to follow in every case, since by no other means can the Government protect itself against frauds of this character, and keep its public mineral domain open to exploration by its citizens. The defendant in error, as a matter of fact, counts its mineral domain, in Lake County, by thousands of acres, nine-tenths of which has been acquired by placer patents similar to the one under consideration, and it will not be pretended that it ever even attempted to develop any of its "placers" save to work and mine the ores from the lodes or deposits contained within their boundaries. Such an abuse of the privileges given by the government

to its citizens, should, if possible, be punished more severely than by the rigid enforcement of the exceptions contained in the patents which have been issued by the President, and under which these wrongs are sought to be justified.

If we are right in the position hereinabove assumed, then, in consideration of the undisputed facts which appear in evidence, the instructions requested by the plaintiffs in error, and which form the ground of the second, sixth and seventh assignments of error, should have been given in substance, if not in their exact phraseology. The Court erred also, in charging the jury that under the circumstances, the defendant in error could be considered the owner or in possession of the lode or deposit underneath the Wells & Moyer placer for any purpose whatsoever, especially in view of the fact that it alleges in its complaint, an ownership and seizin in fee of the entire premises. The action is ejectment and not trespass. Hence possession is not sufficient even as against an intruder. The plaintiff must recover on the strength of his own title, and "the failure of the defendant to show title cannot avail."

Abbott Trial Evidence, 691;
Watts vs. Lindsey, 7 Wheat., 158;
Tyler, Ejectment, 72;
Cobb vs. Lavalle, 89 Ill., 331;
Sedgwick and Wait, Trial of Title to Land, 438;
Eagan vs. Delaney, 16 Cal., 86.

The Code of Civil Proceedure of Colorado, Sec. 249, requires that "the plaintiff in his complaint, shall set forth the nature and extent of his estate in the property, and state whether it be in fee for life, for the life of another, or for a term of years; and specifying such life or the duration of such term; or, if such plaintiff claims the legal right to occupy and possess the premises under the local laws and rules of any mining district, or of the United States, the State of Colorado, or otherwise, the complaint shall con-

tain a brief statement of such possessory claim, and whether the right claimed is by pre-emption, or purchase or by right of actual prior possession on the public domain of the United States."

Under a count claiming an estate in fee simple, especially in States having such a statutory provision, the plaintiff cannot recover a life estate, an estate entail or by possession.

Forsyth vs. Rowell, 59 Me., 131;
Rawson vs. Taylor, 57 Me., 343;
Almond vs. Bonnell, 76 Ill., 536;
Breed vs. Osborn, 113 Mass., 318.

If the defendant in error had alleged possession and not title in fee, as the basis of its claim to the premises in question, the rule would be different; but it is bound by its allegations. It cannot claim one estate in its pleadings and establish its right to the premises by proving another.

Ballance vs. Rankin, 12 Ill., 420;
Rupert vs. Mark, 15 Ill., 540;
Winstanley vs. Meacham, 58 Ill., 97.

If the plaintiff in an action of ejectment must recover on the strength of his own title and not on the weakness of that of the defendant, then it is a contradiction to assert that when defendant proves that plaintiff has no title the latter can nevertheless recover from the fact of possession merely, if the defendant proves no title in himself. That would be a perversion of the rule, since the test of recovery would be failure of title in defendant. If the action were trespass, possession in the plaintiff would be everything; but it is not trespass. The charge given by the court to the jury, in the case at bar, is erroneous in this particular for another reason, which is that the right to damages follows the right to recovery. But for the dismissal by the defendant in error of that part of its complaint, it was entitled, under the instructions given, to ask for a verdict against plaintiffs in error for the value of ores taken by them from

the deposit within the boundaries of the Wells & Moyer placer, notwithstanding its only title thereto consisted of a bare constructive possession based upon a patent expressly excepting the deposit from its grant. In fact, the court instructed the jury that they "should find for the plaintiff with the value of the ore removed from the placer ground by the defendants."

If the patent to the Wells & Moyer placer does not convey to the patentee the lode or deposit in place existing underneath it, then any spoliation of that lode or deposit by an intruder having no title or right to it can result in damage to the Government only and not to the defendant in error, and no judgment obtained by the defendant in error against such intruder could operate to discharge him from responsibility to the Government for his conduct.

The issues presented by the pleadings preclude the idea of right or title in defendant in error by possession merely. It meets the affirmative parts of our answer by a specific denial; and if, under the burden thereby cast upon us, we proved the existence of the lode or deposit within the placer, the knowledge thereof by the patentees and their grantees at the time of their application, entry and patent, and its consequent exception from the granting clauses of the latter, the defendant in error ought not to recover upon the ground of its possession simply, which, at best, is constructive, if it exists at all.

---

2. The second branch of our inquiry, although subordinate to the first, is none the less important in view of the position assumed by the court below, concerning the right of the plaintiffs in error to the ground in controversy, based upon their title to the Crown Point and Pinnacle lode mining claims; since upon the extent of the grant to a lode claimant of the particular vein discovered within and forming the basis of the claim located must depend the title of the plaintiffs in error as against the Government to

that part of the deposit extending within the premises in dispute.

Patents to lode claims must be construed and their operation limited or enlarged, chiefly under the provisions of section 2322 of the Revised Statutes of the United States. For convenience we quote it in full:

"Sec. 2322. The locators of all mining locations heretofore made, or which shall hereafter be made on any mineral vein, lode or ledge, situated on the public domain, their heirs or assigns, where no adverse claim exists, on the tenth day of May, Eighteen Hundred and Seventy-Two, so long as they comply with the laws of the United States, and with State, Territorial and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downwards as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downwards as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim, to enter upon the surface of a claim owned or possessed by another."

While horizontal or "blanket" veins or deposits were not unknown to the mineralogist or geologist at the time of the draughting and passage of the Act of May 10, 1872, concerning mineral lands, they were nevertheless practically unknown to the American miner, and their existence to any great extent within the limits of the public domain was hardly suspected. The Act was based upon the rules, regulations and customs of miners, a common law as it were, which had grown up and adapted itself to the neces-

sities and conditions of a peculiar feature of American industry; tolerated by the indulgence but not warranted by the express assent of the sovereign power. These rules and regulations had been found by experience to be essential to the protection as well as to the ascertainment of the extent of the interest of the miner in his discoveries, and no better basis for a new statute having reference to the dispositions of the public domain in a novel manner, could be found. They had grown up with the mining camps of California and Nevada, had spread over the adjoining Territories, and had been recognized by their several courts whenever controversies arose under them demanding settlement or adjustment by the strong arm of the judiciary. Although differing somewhat in detail, these rules and customs, wherever found, were in the main identical, thus demonstrating their justice and wisdom, and making it an easy task for the legislator to perpetuate their principles and objects by incorporating them almost bodily into the organic *lex scripta* of the nation.

These rules and customs, however, were the consequence of that condition of things which resulted from the general experience and wants of miners as to the subject matter of their daily pursuits. Fissure veins, coming from below upwards, cutting through the several strata composing the crust of the earth, more or less vertical in their general direction and appearing or "outcropping" at the surface, traced with comparative ease, and followed without great difficulty, constituted for the most part the lodes or deposits of mineral in rock in places, which had been discovered and developed by the Western miner up to the year 1872. He generally found such deposits accompanied by a matrix or 'gangue" of quartz, but not in all cases. That being the predominant condition of things, however his rules and customs defined his rights or prescribed his duties with reference to "mining claims *upon veins or lodes of quartz*, or other rock in place;" and Congress made use of the same

language in section 2320 of the Revised Statutes. Following the same rules, it was also provided, since these veins generally appeared on the surface, that "no claim shall extend more than three hundred feet on each side of the middle of the vein at the surface" etc.

With reference to fissure veins or lodes of quartz or other rock in place, therefore, the requirements of the National law are plain and simple. They meet and cover any exigency, without strained construction, which physical conditions presented by such mineral formations might present; and it was not to be expected that different regulations could be necessary or desirable, since different conditions could not well be foreseen.

The stimulus which the passage of the Acts of 1866 and 1872, concerning mines, gave to the business of prospecting, brought an immense area of territory almost immediately into public notice and resulted in the discovery, in 1876 and 1877, of the great carbonate beds or deposits of Leadville. As appears by the testimony contained in the record, these deposits are more or less horizontal in formation generally at considerable distance beneath the surface, and lying upon a stratum of limestone covered by one of porphry rock. They could not be located under the sections of the Act concerning placer claims, because they were in place, and only when parts of them appeared at the surface, which was of very rare occurrence, could they be located under the literal terms of sections 2320 and 2322. It became necessary, therefore, to apply those sections as far as possible to the new condition of things, and to enable the prospector to practically acquire the reward of his discovery by assuming his lode or deposit to be upon the surface and making his location correspond with the shape and dimensions of a lode claim located upon an outcropping top or apex. This system proved satisfactory and accomplished every desirable purpose, until the question of the right to follow the vein or lode from

one location into another became important; and then, while the law was construed with reference to these deposits as it had been with reference to fissure veins, serious complications presented themselves, when the junior locator of a so-called outcrop sought to follow his vein or lode into the territory of a senior locator and discoverer of the same vein or deposit on its dip. The sinking of a shaft anywhere through the porphry to the limestone generally resulted in the discovery of ore, and to take from a miner the ore-body discovered by him in April by means of a shaft sunk 200 feet and give it to an adjoining miner who, in August following, found the same body in an adjoining claim at the depth of two feet from the surface stimulated to such discovery, doubtless, by knowledge gleaned from the labors of the former, seemed inequitable in the highest degree. So long ago as the summer of 1880, in the case of the Iron Silver Mining Company vs. Murphy et al., 2 McCrary, 121, His Honor, Judge Hallett, outlined the probable policy of the courts as to this question whenever it should be fairly presented, in the following language:

"I will say to counsel in that case, which is not for the consideration of the jury, that it has always been a question in my mind, whether a location made on the dip of a vein, would not be valid as against one of latter date higher up; that is to say, whether, if a location be made upon the dip of a vein, the locator may not pursue it in the downward course, although he may not in the upward course, and may not hold the whole which lies within his location and below it, as against any one locating subsequently at a higher point on the same vein."

The identical question presented itself to the same court in the case of Van Zandt vs. The Argentine Mining Company, 2 McCrary, 160, where the same judge determined what has since been the recognized law upon the subject. It is there declared that "although defendant's locations may appear to you to be along the line of the top apex or outcrop of the vein, it cannot prevail against a senior location on the dip of the lode." The soundness of

the doctrine is practically recognized in the case of Pacific M. & M. Co. vs. Spargo, 8 Sawyer, C. C., 645, which case we will refer to more particularly hereafter.

Since the rights of the first discoverer or locator of a vein, whether at its highest point or not, are justly recognized and respected, it seems to us that *as to the particular vein discovered and patented* he should have the same rights of property which is given to those locating by prior discovery upon the outcrop. In either instance the location is made "on a mineral vein, lode or ledge, situated on the public domain," and the vein being the principal thing with the surface as a mere incident thereto, the statute, did it not operate in the same manner with reference to the rights of the locator in either instance, would practically discriminate between the rights of the same class of persons, acquired through a compliance with its terms. If the vein is denied to the junior locator upon its apex as against the senior locator upon its dip, it must necessarily be denied him "throughout its entire depth," since it is plain that he cannot skip over the intervening 300 hundred feet of the senior location and proceed as though there had been no interruption of his right or title. If the senior locator and discoverer is to be protected and rewarded by denying to his junior locator above the right to come within his boundaries, then the same reasons which define his right above must extend his right below, and at least as against one denying it with no title whatever as the basis of such denial, his right to follow the vein so by him discovered and located is absolute. This particular question has never presented itself before for the consideration of a court either of original or appellate jurisdiction; hence we must depend in our presentation of it entirely upon the reason of the proposition as it appears to us, and which, we submit, is in accord with the rules which have been established by judicial determination in analogous cases.

3. A considerable portion of the discussion just preceding has been made necessary by the facts disclosed by the transcript of the record of the cause. The location of the Crown Point and Pinnacle mines is largely upon the dip or below the line of the highest part of the lode or deposit. They have been made, however, upon valid discovery and location; and, in the absence of any proof to the contrary must be presumed to have been made as prior discoveries of the vein or lode, and certainly so as to the premises below them; for it is alleged in the answer and proven by the evidence that both the lode claims of of the plaintiffs in error were discovered and located long anterior to the location of Wells & Moyer placer. The grantors of the plaintiffs in error were therefore in possession and were proprietors of the veins or lodes contained within the Crown Point and Pinnacle claims at the time of such locations of the Wells & Moyer placer to every intent and purpose. It becomes necessary at this juncture, therefore, to consider briefly the third condition inserted by the Government into the patent to the placer claim of the defendants in error, which provides "that the premises hereby conveyed may be entered by the proprietors of any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, for the purpose of extracting or removing the ore from such vein, lode or deposit, should the same or any part thereof be found to penetrate, intersect, pass through, or dip into the mining ground or premises hereby granted" (p. 33 of the printed transcript).

The language of this exception is very broad and it would seem to have been framed for the purpose of covering every possible emergency. Under it the placer "may be entered by the *proprietors of any vein*," etc. The entry is not confined to an underground one, but may be as well upon the surface. It may be made not only if the lode or vein penetrates or dips into the placer, but also

whenever it intersects the premises granted. It seems, in short, to have been inserted in contemplation of the fact that attempts probably would be made by unscrupulous persons or companies to acquire large areas of valuable lode mining territory under section 2333, and that such an exception was necessary for the full protection as well as recognition of the rights of other proprietors.

It will be observed also that the exception now under consideration *is not confined to the proprietors of vein or lode claims*, the veins or lodes in which might be found to penetrate or intersect the placer, and while the phraseology thus noticed may not be, and probably is not very material, nevertheless it is so distinctly worded that the decision of Judge McCrary, which we have before considered, cannot be said to have the remotest bearing upon it. An adjoining proprietor of a placer claim in which existed a lode or vein properly patented, or the existence of which was known and acted upon before patent, would have the same right to follow it under this exception as would the proprietor of a lode claim simply.

Now we maintain that the ouster complained of by the defendant in error consisted entirely in the fact that the plaintiffs in error as proprietors of the Crown Point and Pinnacle veins or lodes, were following their said veins or lodes into the Wells & Moyer placer claim for the purpose of extracting and removing the ore therefrom, inasmuch as the same were found to penetrate or dip into the said placer. Being the oldest locators and in possession at the time of the location and entry of the Wells & Moyer, the plaintiffs in error were the proprietors of the vein or lode mentioned in every sense of the term, and as such proprietors they were invested with every right and privilege, incidental or appendant, to such proprietorship. Nor can defendant in error say that plaintiffs in error is not entitled to the vein within the limits of the Wells & Moyer, because possibly some one else might be shown to have such right.

It is enough for us to reply that the defendant in error has neither shown title in itself to the vein or lode in question, nor has it attempted to show title elsewhere, while we have proven every fact alleged in our answer by testimony which is not even contradicted by implication. "In an action by the patentee of a placer claim to recover possession of a vein or lode within its boundaries, an answer alleging that the vein or lode was known to the patentee to exist at the time of applying for the patent, and was not included in his application, well pleads the facts which, under section 2333 of the Revised Statutes, precludes him from having any right of possession of the vein or lode." Where the proof sustains the answer, the conclusion is inevitable.

Sullivan vs. Iron Silver Mining Co., 109 U. S., 550.

The exception to the patent which we are now considering has been construed in but one instance, so far as we can ascertain, and to which we have already adverted. In the case of Pacific Coast M. & M. Company vs. Spargo, 8 Sawyer, 645, the construction given by the learned Circuit Judge of the Ninth Circuit is in support of our position. There the defendants had not located a claim or become the proprietors of a vein or lode until after the entry and patenting of the placer, but the court assumes that "the language of the exception, strictly construed, seems to refer only to mines located outside the lands, which by their dip or inclination penetrate or intersect the land patented, and not to mines discovered or located within it. But however this may be," the language refers to "persons who are the proprietors of mines at the time when the patentee's rights attached."

Inasmuch, therefore, as the first two exceptions of the patent clearly reserved from its granting clauses the vein or lode of mineral ore then known to exist within the boundaries of the placer, and the third invests the plaintiffs in

error with the right, as proprietors thereof, to enter and extract and remove the ores from underneath the placer, we think the court below erred in instructing the jury as it did and in refusing to give the instructions requested by plaintiffs in error, and that the judgment should be reversed and the cause remanded.

We have endeavored to give the Court every authority bearing upon the questions involved in the record, as well as such reasons as have suggested themselves to us in support of the conclusions urged. The former are very few in number, and the latter, although sound and unanswerable to our view, are far more imperfectly expressed than we could desire. The importance of the case and the great effect which its decision must have upon the interests of the mining districts of the West are the apologies we have to make for the extended consideration which we have given to it.

Respectfully submitted,

T. M. PATTERSON,
C. S. THOMAS,
Attorneys for Plaintiffs in Error.

SUPREME COURT

—OF THE—

UNITED STATES.

JOSEPH REYNOLDS AND
JOHN D. MORRISSEY,
Plaintiffs in Error.

vs.

THE IRON SILVER MINING CO.
Defendant in Error.

Error to the Circuit Court of the U. S.,

DISTRICT OF COLORADO.

BRIEF AND ARGUMENT OF

R. S. MORRISON,

Of Counsel for Plaintiffs in Error.

SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, A. D. 1885.

JOSEPH REYNOLDS AND JOHN D. MORRISSEY,
Plaintiffs in Error.
vs.
THE IRON SILVER MINING COMPANY,
Defendant in Error.

CROWN POINT AND PINNACLE LODE CLAIMS,
vs.
WELLS & MOYER PLACER CLAIM.

Error to the Circuit Court of the United States, District of Colorado.

BRIEF AND ARGUMENT OF R. S. MORRISON,
Of Counsel for Plaintiffs in Error.

Mines divide themselves by considerations based on the nature of the deposit, into

1. Placers.
2. Lode Mines.

Free gold, tin and platina are metals which preserve their integrity after being eroded from their original position in place, and consequently, are found in the loose alluvium of the surface. In England in the tin streaming cases*, can be found a description of placer mining for tin ores exactly analogous to the California placers. The essential peculiarities of a placer mine whether of gold, tin or platina, are, that the ore or metal is found, not in place, but mixed with the loose soil and can only be obtained with practical results, by washing in some form with the rocker or the sluice—on a larger scale by booming and on a grand scale by hydraulic works.

In no art is the scale of development from primitive appliances up to the perfection of wholesale destructive mining more clearly shown than in this series of processes, but all are alike in being different forms of washing, and none of them can be applied to lode mining.

Lode mines, on the contrary, are worked by shafts and inclines; the ore being won by blasting, and when won, crushed and reduced in mills.

Concurrent with these distinctions, it is found that the lode is generally confined to a narrow space between barren rocks, while the placer covers a more extended surface, being spread over the ground, although to some extent confined by typographical causes to the centre of the gulch, ascending up the hill side, more or less according to circumstances.

These essential physical differences between the two different classes of mines, resulted, in this country (by the Acts of 1866, 70 and 72) in producing statutes conforming to their essential differences; i. e. a lode claim was made a narrow strip of ground, not exceeding 1500 feet in length

**Carlyon v. Lovering*, 1 *H. & N.*, 784.

and not more than 600, nor less than 50 feet in width, while to a placer claim was allowed a much greater area.

Under state law, conforming to the Act of Congress, the limit, in Lake County, to a lode claim is 1500 feet in length by 300 feet in width, a parrallelogram which contains 10⅓ acres.

A placer claim, under the same acts, contains 20 acres for each locator, 8 locators being allowed to join and claim 160 acres; under land office rulings, even this supposed limitation was disregarded, and patents are issued for placer claims containing hundreds of acres—in this instance 193 and 43-100ths acres.

But recognizing the fact that to a miner the larger patent would be the more desirable and that it might be possible to get title to many lodes under pretence of the claim being a placer (and they are in fact often found together so that the surface may be washed for gold and underneath may exist the vein which produces it)* it was expressly provided that where a patent issued on a placer, it should *not* include any lodes or veins then known to exist.

With this short premise as to the essential physical differences between lodes and placers, thus recognized in the Acts of Congress providing for the passing of titles to their respective claimants, we will now attend, with like brevity to the local history of what was once California gulch and is now Leadville, as the key to the inception of this action and how it comes that a placer claimant is seeking practically to control and claims absolutely to own, the greater part of the lode deposits of that section.

Ever since 1859, the narrow bed of California gulch had been washed for placer gold and had yielded, in early days, a

*Brown v. 49 Quartz M. Co., 15 Cal., 153.

large amount. These workings were confined strictly to the gulch proper. In 1877 and 78, the lode silver deposits were discovered and locations made on them whenever they could be found. But it is obvious, even from the testimony in this particular case, that these lode deposits, while they approached the surface at particular points, existed, for the most part, at great depths under ground. It followed as a matter of course that a line of lode locations was soon made along this deposit wherever it could be tapped near the surface, while at points where it could not be reached under 400 or 600 feet of sinking, much time must be lost and great expenditure made before ever, if at all, it could be found at such depths. Thus we find in 1878 there had been located the Rock, the Dome, the Crown Point, the Pinnacle, the Oro La Plata, the Gnessen and other lodes. These lay all above, to the west of and at some distance from California gulch proper, where the old placer diggings were. It was also a fact of universal knowledge that the general dip of all these lodes was to the east in the direction of the bed of California gulch. The induction then, was obvious that if any person were to locate a placer claim in California gulch and extend its stakes up to the edge of the lode claims already located, and obtained a patent he would cover all that portion of the deposit not already covered by the locations made on the shallow parts of the lode; that is to say, he would have title to the entire remainder, the bulk of this deposit, unless, indeed, the saving clause, as to *known lodes* were to prevent such result.

Upon this theory, upon the basis of a *bona fide* placer possibly 200 feet in width a placer location is made extending half a mile up the hill towards the lode locations and winding along the very edges of them and taking up even the little interstices between them, and apparently every foot of ground between the gulch and the outside

boundaries of the lode claims then patented, or for which patent applications were pending; for the Court doubtless knows that only lode claims which had been patented (or patent applied for) would appear on the plat of the placer patent and how many other *bona fide* lode claims there may have been on this placer ground, which were bought off or silenced or otherwise prevented from adversing, is a matter of mere supposition which could never get into the record of this case.

We find, therefore, apparent at a glance, the theory upon which this Wells & Moyer Placer location was made and why it was advanced to patent. If successful it will be at once admired as a certain resort for checking prospecting and development in any lode mining district and will be in fact the patenting of a lode deposit of known and enormous value under the fortunate pretence of the same being a placer claim.

We come now to the exact point in this case. The Crown Point and Pinnacle (adjoining lode claims worked as one mine) had been developed to the depth of about 500 feet, and in length by drifting for several hundred feet to a point on the south line of the Pinnacle (map, abs. folio 100) at which point they crossed into the side line of the Wells & Moyer placer, extended vertically downward, where they broke into (or were broken into by) certain works of the Oro La Plata mine, which had also got under the Wells & Moyer lines—these Oro La Plata people not claiming any right there under the Oro La Plata lode patent, but as licensees, or in some other way not disclosed by the record, being in sympathy or privity with the Wells & Moyer title,—in other words we came in contact, not with any placer mine worked by the plaintiffs or with any lode worked from the surface of the Wells & Moyer Placer, but with the works of another lode mine, claiming a right in the premises under the shield of this Wells & Moyer Placer patent.

The Iron Silver Mining company (owning the Wells & Moyer Placer patent) brought suit in ejectment against Reynolds and Morrissey, holders of the Pinnacle and Crown Point patents.

We defended on the ground (without regard to our holding the apex and whether or not a lode whose surface lines include the apex can follow the dip), that the vein in controversy on which we were working was known to exist at the time of the issue of the Wells & Moyer placer patent, and therefore it was not included in the grant of that patent, or was by the same instrument excepted out of it. In this case the language of the patent conforms to the statute (R. S. § 2333) under which it issued.

This placer patent is printed at length in the abstract (folios 66-81) and contains (folio 79) these express exceptions:

"*Second.* That should any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits be claimed or known to exist within the above described premises at the date hereof, the same is expressly excepted and excluded from these presents."

"*Third.* That the premises hereby conveyed may be entered by the proprietors of any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead tin, copper, or other valuable deposits, for the purpose of extracting and removing the ore from such vein, lode, or deposit, should the same or any part thereof be found to penetrate, intersect, pass through, or dip into the mining ground or premises hereby granted."

We have here the express reservation of all veins *known to exist*, in the wording of the patent. The patent is the grantor's construction of the Act, and even if narrower

than the terms of the Act, the grantor is bound by it. If broader and attempting to convey more than the law allowed, it would be void to that extent, but is not void if it contain less. Consequently, even if the statute could be construed that only known lode *claims* located and recorded as such, were to be excepted, the patent itself, following, what we consider the true construction, excepts all veins known to exist, and the Government and its grantees are bound by this construction.

Without regard, however, to this distinction, we claim that the true meaning is to except all known lodes and not merely all lode *claims*. There exist in many parts of the country, mountain sides where veins are known to outcrop; other veins are found with but slight digging; on such a mountain many claims will be found to have been staked and recorded; a few of them will be worked, but more abandoned after temporary experimenting; in some localities after years of development, the whole camp may be temporarily idle, owing to lack of transportation or other causes, and yet be known as a locality containing good lodes, which will eventually be worked as such—now will it be allowed to a placer claimant to locate his placer claim, covering the entire slope of such a mountain, and assert that his patent conveys all these veins, notoriously known and even outcropping, on the pretence that at the time they were not in all respects valid and subsisting lode claims?

Take another instance, and exactly like the case at bar—a lode is discovered and located and proves very valuable; its extension on both ends and its dip on one of its sides are not known and cannot readily be found, but it is known from the nature of things that such extensions and such dip do exist and must ultimately be found and when found, be as valuable as the claims already discovered—what is to prevent

a placer applicant from making his location so as to completely encircle the original claim, procure a patent, and become the owner of all the ultimate results of the discovery (except the original claim)?

The answer is that there is nothing to prevent his so doing, if this Court hold that a placer patent conveys all lodes except those upon which subsisting and complete locations existed at the date of the patent.

Another illustration equally forcible and not any stronger than the facts justify: it frequently happens that a mountain slope is covered with lode locations, laid wherever a lode is accessible through the slide. The whole mountain is known to be silver bearing and no gold washings near it; but there exist between the locations, vacant strips on which no veins have yet been found because of the debris. What is to prevent all this vacant space being patented and all future discoveries becoming the property of the placer owner, if this Wells & Moyer placer be allowed to take the silver deposits not located as claims when it issued, but known to exist with a physical certainty, as great as that by which we know that veins keep a certain general course; that they are found, not in isolation, but as a network; and with the same moral certainty as that by which we know that age does not keep the promises of youth, and that to morrow does not fulfill the expectations of to-day.

But outside of the reason of the thing, we cannot find in the letter of either statute or patent the foundation for this construction.

If our construction be the true, it then only remains to ask: Does the evidence show that this deposit was known when the Wells & Moyer patent issued? Upon this point there is not a pretence of controverting our mass of testimony

showing, not only that it was known generally, but known specifically to the defendant in error, who got its title, not for the little space of placer it covered, but for the lode deposits it was known to embrace on their dip.

We have argued thus far that the Wells & Moyer placer did not take this vein, from the strength of the mere fact that it was a lode known to exist—and if the court sustain this point, it necessitates a reversal because plaintiff then had no title to the premises sought to be recovered, to-wit: the lode worked from the Pinnacle into the placer lines, whatever might be the right, or want of right, in the defendant to the same.

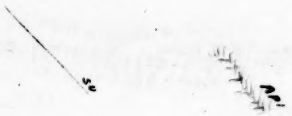
We now proceed to the defendant's title to the ground. Both the Pinnacle and the Crown Point were in fact valid and subsisting locations at the time of the Wells & Moyer application, and were recognized as abutters in the placer patent; were also prior applicants for patent as is shown by the numbers on the surveys. Both patents were in evidence.

They convey the said lodes respectively, and contain the following clause:

"Feet of the said vein, lode, ledge, or deposit, for the length hereinbefore described, *throughout its entire depth, although it may enter the land adjoining*, and also of all other veins, lodes, ledges, or deposits throughout their entire depth, the tops or apexes of which lie inside the exterior lines of said survey, at the surface extended down vertically, although such veins, lodes, ledges, or deposits in their downward course may so far depart from a perpendicular, as to extend outside the vertical side lines of said survey."

Under this claim, based on R. S. § 2322, and contained in all lode patents, we claim to follow across our side lines on the dip into whatsoever ground lies adjoining.

The grant is express to follow such dip. Why should we be denied this right? The Court would have allowed it but for the fact, as the Court say, that our location lines did not happen to cover the apex of the vein. What if they did not? We were not, as in the *Flagstaff case*, seeking to follow on the strike of the vein beyond our side lines. We were following the true dip of the vein, which at that point crossed our side lines. The position is this: there is a vein with a dip, and the first location, as far as the evidence in this case shows, is made, not on the apex, but at some depth on the dip of the vein, thus:



We perceive no reason why the above designated location cannot follow the dip and take the ground below it. This right to follow the dip is not made dependent, either in the patent or the Act of Congress, upon the precedent fact of locating upon the apex. Peradventure in the sketch above given no location may ever be made on that portion of the vein lying above the first location; or, it may be found so broken up and decomposed as not to be worth locating. Why then should not a location made on the dip, take the ground below it by virtue of seniority ?* It requires a greater expenditure thus to strike a lode on the dip, and, as it has been ruled that such a location is good between its lines, so as to cut off a later location on the apex proper, we cannot imagine any technical rule of law or any principle of equity which would destroy the effect of the express grant of the patent, giving us the dip.

If the first location, shown on diagram A, does not take the dip, and yet cuts off the dip from any location above it, in order to obtain title to the lode as it left the first location, successive shafts would have to be sunk and *successive locations made, each one being able to take only the width of the claim.* This would be, in practice an absurdity, and no reason based on the nature of things can be given why a lode claim, perfect in all respects, except its failure to cover the apex, should not be allowed to follow the lode indefinitely upon its dip, except as against prior rights, if any, acquired on the dip still below it.†

To return to the *Flagstaff case.* The following diagram represents that case as far as it can be learned from the report without pretending to be drawn to a scale or to represent the working, except, generally.

**Iron Mine v. Loella Mine*, 2 *McCrary*, 147.

†*Van Zandt v. Argentine Co.*, 2 *McCrary*, 165.

The Flagstaff company were really attempting to follow the strike of the lode, and in so doing got beyond their side lines. Of course they were cut off. Had they been following the dip, they would have been working somewhere in the direction of one of their end lines. In the case at bar we go out of our side lines at a substantially right angle—not only to those side lines, but to the apex itself, as indicated in the plat A.

The entire idea of the lode mining patents, is a departure from the common law rule that a grant is bounded by vertical planes drawn indefinitely downward. The grantee in a lode patent takes so many feet on the vein and a right to follow it on its dip into adjoining ground patented or unpatented, and on the opposite side some other proprietor may be following another vein underneath the side lines of the first; if every lode patent is subject to this right *a fortiori*, should a lode patentee be allowed to follow his vein into an adjoining placer whose only excuse for existence is based on the theory that it contains no lodes—which acknowledges on its face the right of all adjoining proprietors to dip underneath it.

In the case of the *Richmond Co. vs. Eureka Mining Co*, 103 U. S. 839, this Court held that a deed of partition between two mines must be construed so as to extend the agreed line of division as far as the dip of the mine extended.

In *U. S. v. Mullan* 10 Federal Rep. 785, all "known mines" of coal are excepted from railroad grants and the patent was vacated on proof of such mines being known. And in this and other Courts in the construction of statutory grants excepting mineral lands, no more is required to make an exception from the grant than the general fact that the land is "mineral;" (*McLaughlin v. Powell* 50 Cal. 64). "Well known to be so:" *Mining Company v. Consolidated Mining Company* 102 U. S. 175. And whether noted by the govern-

ment surveyors or not: *Morton v. Nebraska* 21 Wall. 674. And in *Gold Hill v. Ish*, 5 Oregon 104, a patent for an agricultural claim containing a notoriously known mine was held void.

Since the argument of my colleagues was filed two cases have been decided, *Clary v. Hazlett*, 7 Pacific Rep. 701 by the Supreme Court of California and *Mantle v. Noyes*, 5 West Coast Rep. 611 by the Supreme Court of Montana. In each of them they decide that a prior lode location is not covered by the placer patent. And here we desire the Court to note that, as in these cases cited, we are not attacking in a collateral proceeding this Wells and Moyer Patent but merely showing what ground was included within its excepting clauses.

The Montana case was between a placer patent and a lode location; in the California case it cannot be told whether the lode was located before the patent or whether it was only a *known lode* when the placer patent issued. They decide the case on the limiting clauses of the statute and of the patent and declare the exception of "any vein or lode" "claimed or known to exist" to be valid and operative.

This case involves one further point, included in the general proposition that plaintiff must recover on the strength of his own title, to-wit:

If the Court decide, (1) that the plaintiff has no title, all known veins being excepted, and (2) that defendants cannot go beyond their side lines because of failure to cover apex, it remains, then, that neither party has title, but that defendants (plaintiffs in error) were the first in possession of unappropriated public domain. *Hughes v. Devlin*, 23 Cal. 501. His possession is perfect, although not followed up by location or record. *Murley v. Ennis*, 2 Colo. 300.

Possession is property. *Brannan v. Gaston*, 17 Cal. 375; 7 Mining Rep., 426. The working of a mine is possession of the mine. *Harker v. Birkbeck*, 3 Burr. 1556. Possession of a drift is possession to the centre of the earth. *Haguaia v. McCunniff*, 2 Colo. 367. The party in possession of public land is owner as against all the world except the United States. *Smith v. Doe*, 15 Cal. 101; 5 Mining Rep. 218. Tenant of lands though without right to work the mines is in possession thereof. *Keyse v. Powell*, 2 El. & Bl. 132.

In conclusion, we think that our colleagues' argument fully covers the case, and are happy to support them in their views as best we may. The importance of this suit may be little to the Court, but is more to counsel; their causes are their children for whom they wish success in life; greater still to clients, who are powerless to assert their rights except by the proxy of the profession, and of immense interest to the mining community, who look at all these placer patents in a lode district as a common enemy, having no reason for their being when found to cover lodes in place.

R. S. MORRISON.

THOS. M. PATTERSON,
C. S. THOMAS,
CHAS. H. WENZELL,
R. S. MORRISON,
Attorneys at Trial.

Office Supreme Court U. S.
FILED.
NOV 23 1885
JAMES H. McKENNEY.
CLERK.

116 687

SUPREME COURT

OF THE

UNITED STATES

October Term, A. D. 1885.

JOSEPH REYNOLDS, ET AL,
Plaintiffs in Error,

AGAINST

THE IRON SIVLER MINING COMPANY,
Defendant in Error.

No. 843.

Error to the Circuit Court of the United States for the District of Colorado.

Brief and Argument of G. G. Symes, Counsel for Defendant in Error.

G. G. SYMES,
Of Counsel for Defendant in Error.

DENVER, COLORADO:
C. J. KELLY, PRINTER, 406 HOLLADAY STREET.
1885.

SUPREME COURT

OF THE

UNITED STATES

October Term, A. D. 1885.

JOSEPH REYNOLDS, ET AL,
Plaintiffs in Error,

AGAINST

THE IRON SIVLER MINING COMPANY,
Defendant in Error.

No. 843.

Error to the Circuit Court of the United States for the District of Colorado.

Brief and Argument of G. G. Symes, Counsel for Defendant in Error.

Statement of the Case.

The statement of the case by plaintiffs in error is somewhat correct, with the exception that the replication of defendant in error, plaintiff below, sets up the facts that the plaintiffs in error, defendants below, have no top, apex or outcrop of a mineral vein or lode within the exterior boundaries of their said Crown Point or Pinnacle lode mining claims. Said replication also denies that any lode, vein or mineral deposit, dips or passes on its downward course from the said Crown Point or Pinnacle lode mining claims, into or

underneath the said Wells and Moyer patented placer claim; and avers affirmatively that the plaintiff company was the owner in fee, and in the actual possession of the Rock and Dome lode mining claims, which adjoin immediately to the said Pinnacle and Crown Point mining claims on the north, and that within the exterior boundaries of the said Rock and Dome mining claims their is a vein, lode, lead and valuable mineral deposit of quartz and other rock in place, and which has its top, apex and outcrop, or highest end, within the boundry lines of said Rock and Dome lode mining claims, and which said lode, vein and mineral deposit, on its dip and downward course, enters into and underlies the land adjoining, a portion of which land adjoining consists of ground covered by the said alleged Crown Point and Pinnacle lode mining claims, and that any portion or part of any vein, lode or valuable mineral deposit found or developed underneath the surface of the said Crown Point and Pinnacle lode claims, is a part and portion of the said Rock and Dome lodes, veins and mineral deposits which have their tops, apexes and outcrops within the boundary lines of said Rock and Dome lode claims, and which dip as aforesaid into the said Pinnacle and Crown Point lode claims.

The controversy in this case arises entirely out of the admitted fact that the defendants below, worked, mined and carried away ore from that part of a mineral deposit lying underneath the surface of the plaintifi's (below) patented land. The plaintiff proved title by deeds from patentees of the said Wells and Moyer placer claim, and the defendants, from patentees of the Pinnacle and Crown Point lode claims. The defendants claim the right to so work, mine and carry away ore from the plaintifi's patented land, adjoining their patented lode claims, on the ground that they followed the lode or vein on its dip and downward course, into and underneath the surface of the land adjoining, which plaintiff owns by virtue of said placer

patent. Defendants assert this right under the provisions of Section 2322 of the Revised Statutes of the United States, which gives the right, under certain conditions and limitations, to follow the dip and downward course of a vein or lode underneath the surface of adjoining land owned by another, and remove the ore therefrom.

We shall contend that the only question involved in this case arises upon the construction and application of this section of the Statute to this case.

The plaintiffs in error seem to contend that the decision of this case depends upon the construction given to Section 2333 Revised Statutes of the United States, which provides for a reservation or exception to the grant of a placer patent of known lode mining claims which existed before the date of the application for the placer patent, within the exterior boundaries of the placer claim. We contend, the questions arising upon that section and the reservation clauses in the placer patent, somewhat in accordance with this section have no application to this controversy, but will be compelled to refer to it in our argument in answer to plaintiffs' argument, which seems to be founded mostly upon the construction of said Section 2333.

Brief and Argument.

The plaintiffs in error have not put their lode patents into the bill of exceptions, but in their third proposition on page 6 of their brief, which they discuss, they cite the exception contained in the Wells and Moyer placer patent, upon which they base their right to follow underneath the surface of defendant's patented ground. The record does not show that the patents of plaintiffs, upon which they rely for their right to follow the vein underneath defendant's ground, contains any granting clauses in accordance with the provisions of said Section 2322. Hence, we contend the record shows no right of action whatever, under any circumstances, in the defendants below to follow the vein under the surface of the placer claim adjoining. The language of the excep-

tion in the placer patent could give such right, only in case the record showed that there were such granting clauses in the lode patents upon which plaintiffs base their right and title, expressly giving the right to follow the vein out of the vertical side lines, under the provisions of said section. We contend the Court cannot presume from anything found in this record, that the plaintiffs have any such right unless the lode patents were incorporated in the record, and such granting clauses were found in them. The clause cited in the third proposition of plaintiffs' argument, page 6 of their brief, and found in the copy of the placer patent in the third reservation clause, on page 33 of record, has been inserted in all patents issued by the United States since the passage of the mining statutes in 1866 and 1872. This reservation clause is found as well in agricultural and lode mining patents, as in placer mining patents. It is intended as a reservation, to aid in carrying out the provisions of that part of Section 2322, under which owners of lode claims are granted the right in lode mining patents, on certain conditions specified, to follow the vein or mineral deposit on its downward course or dip, into the land adjoining, although such land adjoining may be owned and possessed by other parties. There is no provision of the statute authorizing this particular clause to be inserted in the placer patent. We presume it has been inserted by the Commissioner, in the many patents issued since the passage of said mining statutes, for the purpose of avoiding the apparent conflict that might arise, if the owner of patented land, into and underneath which a lode or vein may pass on its dip, shall not have apparently, the patent title, in conflict with the granting clauses inserted in lode mining patents, giving the right under said Section 2322 to follow the vein on its downward course into and underneath the land patented to another. But, as above stated, in this case we are not confronted with any lode mining patents containing the granting clauses provided for in said Section 2322, and, there-

fore, it would seem unnecessary to discuss the provisions of that section providing for such granting clauses in lode patents which do not appear in this record. We contend, therefore, that upon this record, the plaintiffs in error show no legal right whatever to follow underneath the surface of the placer claim, but are naked trespassers, as the Court instructed the jury they were. The universal rule of American law is, that every patent conveys to every patentee everything upon and beneath the surface of the ground, within the boundary lines drawn vertically down into the earth. There is an exception under Section 2322 by which owners of lode claims are granted the right in lode patents, on conditions specified in such patents, to follow veins or lodes into the land adjoining. Whether the plaintiffs in error have any patents to their alleged lode claims containing any such granting clauses, we do not know and the Court cannot presume.

However, in deference to the labored argument of the counsel for plaintiffs in error, we will briefly discuss the second proposition of their argument, found on page 6 of the brief of Patterson and Thomas, regarding:

"What is the limit and extent of the grant of the Gov-
"ernment to the proprietor of a lode claim under section
"2322 of the Revised Statute, to the particular vein located
"and patented."

The questions arising on the construction of such granting clauses in lode patents, have been so often construed by the courts, and so much litigated, that the law in such cases has become well settled. The language of said Section 2322 is as follows, viz:

"The locators of all mining locations heretofore made,
"or which shall hereafter be made, on any mineral vein,
"lode or ledge situated on the public domain, their heirs
"and assigns where no adverse claim exists, on the tenth of
"May eighteen hundred and seventy-two, so long as they
"comply with the laws of the United States, and with state,
"territorial and local regulations not in conflict with the
"laws of the United States governing their possessory

"title shall have the exclusive right of posession and "enjoyment of all the surface included within the lines of "their locations, and of all veins, lodes and ledges through- "out their entire depth, the top or apex of which lies inside "of such surface lines extended downward vertically, "although such veins, lodes or ledges may so far depart "from a perpendicular in their course downward as to "extend outside the vertical side lines of such surface loca- "tions; but their right of posession to such outside parts "of such veins or ledges shall be confined to such portions "thereof as lie between vertical planes drawn downward, as "above described, through the end lines of their locations, "so continued in their own direction that such planes will "intersect such exterior parts of such veins or ledges; and "nothing in this section shall authorize the locator or pos- "sessor of a vein or lode which extends in its downward "course, beyond the vertical lines of his claim to enter "upon the surface of a claim owned or posessed by "another."

It will be seen from the express language of this section, that the owner of a lode mining claim who has a lode mining patent, with the granting clauses in accordance with said Section 2322 may follow a lode or vein on its dip or downward course into the land of another, although such vein or lode may so far depart from a perpendicular as to extend outside the vertical side lines of his surface location or mining claim. But as so often particularly decided and laid down by the courts, the right to follow such vein outside of the vertical boundry lines of the claim, depends upon three distinct conditions, viz: (*First.*) The top or apex of such vein or lode must lie inside of the surface boundary lines extended downward vertically; (*Second.*) Such lode or vein must dip in the direction of the end lines, and not in the direction of the side lines of the claim, that is, the claim must be laid substantially along the course and strike of the lode, and, (*Third*) the title of the owner of the claim seeking to follow into the land of another, must be older than the title to the claim or land into which the vein passes on its downward course. There are other conditions, such as that the vein must be so dis-

tinct and continuous that it is practicable to develop and follow it upon its dip, in the usual course of mining.

It is unnecessary to refer at length to the record in this case, to show that neither in the pleadings nor the evidence, do the plaintiffs aver or attempt to prove that the apex of that portion of the vein in dispute, is within the vertical boundary lines of their lode claims, or that the vein dips out of the side lines of their said claims, in its downward course, into the land in controversy; and the record shows that the patent title, or title in fee of the plaintiff below, is older than the defendants' title to the said lode claims; but the undisputed fact that defendant's below do not claim to have the top or apex of that part of the vein in controversy within their lode claims, makes it unnecessary to discuss at length, the subject of their right to follow on the dip of the vein into the adjoining land.

That portion of Section 2322 which gives the right to follow the vein or lode into the land adjoining, owned by another, is very fully and clearly construed in the case of Stevens vs. Williams et al. 1 McCrary C. C., 480.

Mr. Justice Miller, in this case, in his very clear and able charge to the jury, decides just when and under what circumstances, the language of said section applies. The case arose over a portion of the contact vein in the Leadville District, situated near the premises in controversy. The learned Justice in that case says:

"If it is a continuous vein of mineral matter, and if "his side lines cover the apex or outcrop of that vein, "and if those lines are extended in a proper direction "across the shoot, or course or strike of that vein matter' "he has the right to pursue it. * * * Now I "state to you, in the first place, if that is a vein of mineral "matter within the meaning of the act of Congress, and in "the second place, if the plaintiff's side lines are laid along "the course or shoot of that vein, and enclose its top, apex "or outcrop, and if the plaintiff, in the pursuit of that vein "into the bowels of the earth, pursued it downwards con-

"tinuously, he is right in this controversy, and he should "obtain your verdict."

See pages 482 and 483.

"* * * The next point is, that it is denied, "that there is a top or apex to this ledge or vein, and that 'if there is such a one, it is not within the side lines of the "plaintiff's patent. Perhaps upon that point the defend- "ants have mainly rested their case. I think that you will "agree with me, as all the counsel agree, and all the wit- "nesses agree substantially, conceding that there is a vein, "that the top or apex of a vein, within the meaning of the "Act of Congress, is the highest point of that vein where "it approaches nearest to the surface of the earth, and "where it is broken on its edge so as to appear to be the "beginning or end of the vein." (See page 489, same case.)

In the case of Iron Mine against Loella Mine, 2 McCrary C. C., Page 121, the Circuit Court, by Judge Hallett, charged the jury :

"* * * The top or apex is the end, or edge "or terminal point of the lode nearest the surface of the "earth. * * * Having discovered a vein, and "located the claim so that the top or apex thereof is within "its surface lines extended down vertically, the locator is "by law permitted to follow it to a any depth, although in "its downward course, the lode or vein may enter the ad- "joining land." (See page 124.)

"The principal question for your consideration is "whether the plaintiff has the top and apex of the lode in "its location, or within the lines of its location extended "downward vertically. As presented by the evidence, the "question is, whether the top and apex of the lode is any- "where exposed, or does in fact, lie in plaintiff's ground."

These are two leading cases upon the construction of said Section 2322. The controversies arose in the Leadville District.

The law as laid down in these cases, has been universally followed since. We are not aware that any attorneys have before contended for the right to follow a vein on its downward course, into the land adjoining owned by another, without proving title to a lode mining claim, and that the top or apex of that portion of the vein or lode

sought to be followed, was within the side boundary lines of such lode claim.

It may be mentioned in passing, that counsel for the defendants in error, conducted the cases for the plaintiff, The Iron Mining Company, above cited, and we did not contend in those cases, for the right to follow the vein under the land adjoining, without showing the top, outcrop and apex within the the vertical boundary lines of the lode claims owned by the plaintiff company. Some of the counsel for plaintiff's in error, in this case, defended those actions, and insisted that we were not entitled to follow the vein or lode outside of the vertical boundary lines of the claims, even if we did show an apex, dip and continuous vein, and contended, and attempted to prove, that the contact vein in the Leadville District was not of such a character, geologically or legally, as to come within the provisions of said Section 2322. Now they are in this case contending for the right to follow a vein, under the patented land of an adjoining claimant, without showing an apex, or showing that their claims are located along the strike of the lode, so that it dips out of the side lines, as specially required by the decisions in the cases above cited.

There is another reason why the plaintiffs in error show no right to follow the vein into the adjoining land. The record does not show that they have an older title in fee than the defendant in error. The record shows that the patent title of the defendant in error is older than any patent title of the plaintiffs' in error.

In the Pacific Coast M. & M. Co., against James Spargo et al., 8 Sawyer, C. C., 645, it is expressly decided that the owner of a lode claim cannot follow his vein under the adjoining land of another, even though he has a patent title, and a top or apex within the claim, except his title be older than the adjoining proprietor's. Judge Sawyer, in this case, says :

"The patent to the plaintiff's grantor contained the

"clause * * * And also subject to the right "of *the proprietor of a vein or lode*, to extract and remove "*his ore* therefrom, should the same be found *to penetrate* "*or intersect the premises hereby granted, as provided by* "*law*. Defendant's insist that the mine subsequently "located, is embraced in this provision. * * * "The language of the exception strictly construed, seems 'to refer only to mines located outside the lands, which, by "their dip or inclination, penetrate or intersect the land "patented, and not to mines discovered and located within "it. But however this may be, the language certainly does "not mean parties claiming to be proprietors, who locate "mines after the issue of the patent, but only persons who "are proprietors of mines when the patentee's rights at- "tach. When the patent issues, it covers everything em- "braced in the land, to which no prior right has attached, "otherwise, the patent would not have reserved the rights "of the *proprietor* of a vein, but would have reserved *the* "*vein itself*."

The land into which it was sought to follow the vein in this case, had been patented as agricultural land, but the title in fee to the lode or vein claims is much later than the patent to the land.

Counsel contend that a patent for a placer claim, does not convey any lode deposits, although the last clause of Section 2333 expressly provides that "a patent for a placer "claim shall convey all mineral and other deposits within "the boundaries thereof." Where the existence of a vein or lode is not known, and as we shall show hereafter, the vein or lode referred to in that section, is a vein or lode claimed, located and owned by a third party before the application is made for the placer patent. Surely an agricultural patent is subject to more doubts and restrictions regarding what mineral deposits may be conveyed by it, than a placer patent, the object of issuing which, is to convey the mineral deposits of the public domain.

In the case of VanZandt vs. The Argentine Mining Company, 2 McCrary, C. C., pages 159 and 165, it was decided by this Circuit Court, that a junior title to a lode mining claim, with the top or apex of a vein within in it,

could not follow under an older location adjoining, on the dip or downward course of the vein. The Judge in this case said:

"This being shown, although defendant's location may "appear to you to be along the line of the top, apex or "outcrop of the vein, it can not prevail against a senior "location on the dip of the lode."

The evidence and the record shows that the lode mining claims of plaintiffs in error were located cross wise running with the dip of the vein, instead of length wise along the strike of the vein. The Court in its charge, specially finds and passes upon this part of the testimony. On page 74 of record, the Court say:

"But here the defendants show no title or right in the "lode at the place in controversy. They assume the right to "follow the lode on its dip without the side line of the Pin- "nacle location, and under the Wells and Moyer placer "location so that it is essential that they have the top and "apex of the lode within their location in the general direc- "ion of the location. A small segment of the top and apex "of the lode is shown within the Crown Point location, but "it extends, not with the length of the location, but across "it, so as to convert the side lines of the claim into end lines, "and to limit the direction in which it may be pursued to "the space enclosed by those lines. The place in contro- "versy is not within the side lines of either of defendant's "location, nor within the extension of those lines."

And the Court then instructs that plaintiffs in error are naked intruders.

This ruling is in accordance with the decision of this Court in the case Mining Company vs. Tarbott, 8 Otto, pages 463, 467, 468. In this case, the parallelogram of ground, constituting the lode claim, was laid across the strike or course of the lode and in the direction of the dip instead of along the course, strike or trend of the vein, and it was held that the side lines became the end lines, and the party could follow the vein on its downward course between the side lines, but could not pass out of the side lines on the strike. The case is parallel to this.

Again, in deference to the learned and labored arguments of counsel for plaintiffs in error, we will discuss the first of their three propositions stated by them on page 6 of the brief of Paterson and Thomas, regarding what is the limit and extent of the grant and reservation clauses contained in a patent issued for a placer mining claim, and particularly the reservation clauses of such patent inserted under the provisions of Section 2333 of the Revised Statutes of the United States.

We contend, the construction of said section, and the reservation clause in the placer patent, found on page 33 of the record, could only arise in case the plaintiffs in error allege title to a lode mining claim located upon the surface, and within the exterior boundaries of said patented placer claim, as herein above stated.

In this case, plaintiffs in error claim no right or title to any portion of the surface of defendant's patented placer claim. They do not claim to have located any lode mining claim within the boundaries of said placer claim, either before or since the patent was issued. The reservation of the rights of owners of lode claims, containing lodes or veins of rock in place, located within the boundaries of a placer claim, is provided for by said Section 2333, in the following language:

"Where the same person, association or corporation is "in possession of a placer claim, and also of a vein or lode "included within the boundaries thereof, application shall "be made for a patent for the placer claim, with the state- "ment that it includes such vein or lode, and in such case a "patent shall issue for the placer claim subject to the pro- "visions of this chapter, including such vein or lode, upon "the payment of five dollars per acre for such lode claim, "and twenty-five feet of surface on each side thereof. The "remainder of the placer claim, or any placer claim not "embracing any vein or lode claim, shall be paid for at the "rate of two dollars and fifty cents per acre, together with "all costs of proceedings; and where a vein or lode such "as is described in Section twenty-three hundred and twenty, "is known to exist within the boundaries of a placer claim

"which does not include an application for the vein or lode "claim it shall be construed as a conclusive declaration that "the claimant of the placer claim has no right of posses- "sion of the vein or lode claim; but where the existence of "a vein or lode in a placer claim is not known, a patent for "the placer claim shall convey all valuable mineral and "other deposits within the boundaries thereof."

The first sentence of this section provides how the owners of a placer claim may, by an auxiliary application, incorporated in his application for a placer patent, obtain title at the same time and in the same proceeding, in the Land Office, to a vein or lode claim, which he owns or possesses by discovery, location, etc., in accordance with the Statutes, within the exterior boundaries of his placer claim. This sentence is only applicable to the question now under discussion, when used to aid in considering the language of other portions of the section. The first member of the compound sentence which composes the remainder of the section, is also only useful here, to determine the meaning of the last portion of the section. It is the construction or meaning to be put upon the last portion of the section, that determines the rights of parties when a controversy arises between the patentee or grantee of a placer patent and a party who claims that he owned and possessed a lode mining claim, duly located, discovered and recorded within the exterior boundaries of the placer claim, before the application was made for the placer patent. In such case he may, with some plausibility, contend that his lode claim is excepted from the grant in the placer patent, and his rights reserved under the reservation clause in the placer patent hereinbefore referred to.

This question was elaborately argued before the Honorable George W. McCrary, Circuit Judge, in the case of The Iron Silver Mining Company vs. Sullivan et al., and decided in June, 1883, in this district. The reported opinion is found in 5 McCrary, pages 274–278, as stated in that opinion of the learned Circuit Judge:

"The first thing that strikes us as an important matter "in the construction of this language, is, that we are refer- "red back to Section 2320 for a description of the vein or "lode which is referred to, and which is not to pass to the "patentee unless he has complied with this provision of "the Statute."

The language of the section is: "and where a vein or "lode, such as is described in Section 2320 is known to "exist within the boundaries of a placer claim, an applica- "cation for a patent for such placer claim, which does not "include an application for the *vein or lode claim*, shall be "construed as a conclusive declaration that the claimant of "the placer claim has no right of possession to the vein or "lode claim; where the existence of a vein or lode in the "placer claim is not known, a patent for the placer claim "shall convey all mineral or other deposits within the boun- "daries thereof."

Section 2320 describes the character of lode mining claims that may be located. The language of said section is: "mining claims upon veins or lodes of quartz or other "rock in place bearing gold, silver, etc." It next prescribes the length of such mining claim; it next provides that "no "location of a mining claim shall be made until the dis- "covery of that vein or lode within the limits of the claim "located." This section next provides the width of a min- ing claim within certain limits, to be governed by local laws, etc. Now, the meaning of a vein or lode claim referred to in the second sentence of Section 2333, and which is re- served or excepted from the placer patent grant, is described in this section, and what kind of a vein or lode or lode claim is it? (1.) It must be upon a vein or lode of quartz or other rock in place; (2.) Its length must be not over 1500 feet; (3) No such lode claim can be located until the lode or vein is discovered within the limits of the claim located; that is, not until the lode or vein is found and ex- posed to view, by some shaft or other working; (4.) It should not be more the 300 nor less than 50 feet on each side of the center of the vein, and (5,) the end lines of such claim must be parallel. All these requirements are imper-

ative to constitute a lode mining claim, and to give any right or title to such a claim, which can be asserted in any court by any party under any general law or statute.

We contend, that the simple and only question involved in the discussion of this question under said reservation clause in the placer patent, before said reservation clause has any application, is, where the parties claiming to have a lode or vein mining claim excepted from the granting clause of the placer patent, and brought within said reservation clause, they must be the owners by possessory and preemption title, of such lode mining claim, at or before the date when the placer patent was applied for. That is, had a lode or vein, or valuable mineral deposit been discovered within the boundaries of such mining claim, and a claim located and recorded in accordance with the United States Statutes and the local rules and customs (which in this State is governed by the State Statutes,) and was the possessory title such that a party could maintain or defend a suit in the courts, by pleading it?

If parties do not plead title to such a lode mining claim, how can they come into Court and contest the rights of an owner by patent, to any portion of the patented premises? Any other construction or theory attempts to defeat a patent title, by alleging and attempting to prove some imaginary lode or vein, as a geological supposition without having dicovered any lode or vein, or having located any mining claim upon it, in accordance with law, or otherwise. No lode or vein, or lode or vein mining claim, can exist in legal contemplation so as to be the subject of a grant or patent, or the subject of a reservation in a grant or patent, unless it has been located in accordance with the requirements of the statutes above and hereinafter set forth.

Section 2319 of the R. S. U. S. provides, that:

"All valuable mineral deposits in lands belonging "to the United States * * * under regulations "prescribed by law and according to the local customs or "rules of miners in the several mining districts. * * "

Section 2324 provides that:

"The miners of each district may make regulations "not in conflict with the laws of the United States, or with "the State * * * governing locations of claims, "regarding the work necessary to hold possession of the "claim, subject to certain limitations therein prescribed."

It will be seen from these sections that the mineral deposits and the land in which they are found, while it continues public domain, can be occupied explored and held, only under the regulations prescribed by the United States Statutes and local rules and customs.

In the State of Colorado, the local rules and customs, or local law is prescribed by the Legislative Assembly, and found in the Statutes of the State.

The following sections of the laws of Colorado, of 1877, provide how lode mining claims may be discovered, located and recorded, to give claimants any rights to possession or ownership.

Page 629.

"1813. SECTION 3. The discoverer of a lode shall "within three months from the date of discovery, record his "claim in the office of the recorder of the county in which "such lode is situated, by a location certificate which shall "contain:

"*First*—The name of the lode.

"*Second*—The name of the locator.

"*Third*—The date of location.

"*Fourth*—The number of feet in length claimed on "each side of the centre of discovery shaft.

"*Fifth*—The general course of the lode, as near as "may be.

"1814. SEC. 4. Any location certificate of a lode "claim, which shall not contain the name of the lode, the "name of the locator, the date of location, the number of "lineal feet claimed on each side of the discovery shaft, the "general course of the lode, and such description as shall "identify the claim with reasonable certainty, shall be "void.

"1815. SEC. 5. Before filing such location certificate, "the discoverer shall locate his claim by:

"*First*—Sinking a discovery shaft upon the lode to the "depth of at least ten feet, from the lowest part of the rim "of such shaft at the surface, or deeper, if necessary, to "show a well defined crevice.

"*Second*—By posting at the point of discovery, on the "surface, a plain sign or notice containing the name of the "lode, the name of the locator and the date of discovery.

"*Third*—By marking the surface boundaries of the "claim.

"1816. SEC. 6. Such surface boundaries shall be "marked by six substantial posts hewed or marked on the "side or sides, which are in toward the claim and sunk in "the ground, to-wit: one at each corner and one at the "centre of each side line."

Section 2322 R. S. U. S., before cited, provides what rights of possession and enjoyment, or possessory or pre-emption title, a party may acquire to a lode or vein mining claim, and any lode or mineral deposit contained within it, by going upon the public domain and discovering, locating, recording and marking the boundaries, and working upon and developing such lode mining claim.

If these United States and State Statutes are complied with, the locator becomes the owner of the possessory or preemption title of a mining claim, or, as this Court has held, becomes the licensee of the government. His pre-emption title and possession, is protected by law and in the courts, to about the same extent as if he held a patent, and he has the prior right to apply for and obtain a patent.

We contend, that this is the kind of a lode or vein, or lode mining claim that is reserved from the grant of a placer patent under said Section 2333 (if the exception is not void, for reasons hereinafter set forth) where third parties have themselves located, held or possessed such a lode claim, within the boundaries of a placer claim, before the application is made for placer patent, and none other.

It was the intention of the statute to protect the prior rights of third parties in and to such lode claims, when such rights or title to such lode claims had been acquired before the application for the placer patent was made; but

the plaintiffs in error say that it is simply a lode or vein, or mineral deposit, that is reserved from the placer patent grant, and not a vein or lode mining claim, containing a vein or lode; that if a vein or lode was claimed, or known to exist, that it is reserved out of the grant, for future discovery and location by any person or persons. How can a lode or vein be *claimed* or *known* to exist? Manifestly, only by being discovered, located, recorded and held in accordance with the requirements of the statutes of the United States and the State, as hereinabove set forth.

If any person can legally show that he claims or knows there exists or possesses a lode of quartz, or other rock in place bearing gold, silver, etc., in any other mode than by showing that he has discovered, located and recorded it, in compliance with the State and United States Statutes, we should be pleased to learn how such a legal claim can be established. If any party can show that a vein or lode, such as is described in Section 2320, is legally known to exist within the boundaries of a placer claim, at or before the time of the application for patent for the placer claim, or afterwards, in any other mode than by showing such discovery, location and possession, we shall be very curious to learn the legal methods of showing and establishing such possession, right or existence, until the Court points out the mode. How, otherwise, can parties acquire any such legal standing in court, as to give them the right to contend against the patent title of the defendant in error, or produce any evidence to bring themselves within the said exceptions or reservations in the placer patent?

It will hardly be controverted that that portion of the charge of the court in this case, which holds that a placer patent is at least a *prima facie* title to all veins or lodes within its boundaries, until some better title is shown, and that no person can contest that *prima facie* title, unless he brings himself within the rule in such cases, of connecting

himself with the Government by some legal location or claim of title, is not good law.

Doll vs. Meador, 16 Cal., 296.

St. Louis Co. vs. Kemp, 104 U. S., 636.

The court follows the law laid down in these cases when it states in its charge that:

"There might be a question of some difficulty when "presented by or on behalf of one who has shown some "right or interest in the lode, or an intention to claim the "same according to the local law and the Acts of Congress. "But here the defendants show no right or title to the lode "at the place in controversy."

Not showing, or pretending to have any such legal right, the court decided the defendants to be naked intruders upon the plaintiff's premises.

Let us see what kind of an issue was attempted to be tried before the court and jury in this case, by following the trial as it occurred and is reported in the record. The plaintiff introduced its placer patent and deeds, showing title to the ground in controversy, and proved by one witness that the trespass, consisting of mining and taking away ore, had been committed within the boundries of the patented premises. The defendants attempted to show title to the Pinnacle and Crown Point mining claims adjoining on the surface, plaintiff's premises, and then called a number of witnesses to prove that they entertained the opinion some years ago, before the application for the placer patent, that the contact lode or vein which had been cut and exposed at various points outside of said placer claim by shafts and other developments on lode claims, extended underneath said placer claim at a great depth beneath the surface. They also testified that such was the opinion of a number of persons in the community. That is to say, that there was a geological opinion, deduction or conclusion, entertained by some of these witnesses and by other persons in the community, that a lode or vein of rock in place extended underneath the said placer claim on account of its

appearance in workings some distance away. If the Court had not practically decided the case against the defendants below, on questions of law, the jury would have been called upon to consider this testimony. Plaintiff below objected to the introduction of all this testimony, and saved its exceptions thereto, and did not attempt to rebut it, because it was of the opinion that the testimony is entirely irrelevant and impertinent to any issue in the case, and to any legal issue that can be formed in any case. These exceptions were not formally stated in the bill of exceptions, because they could not avail us as defendant in error. Also to evidence about the intentions of the patentees in obtaining the patent. If that intention is legal evidence then indeed a United States patent is a myth.

If plaintiff below had proposed to contest this issue of fact with defendants, it would, of course, have called witnesses, expert and others, to show that no such a supposition could arise from the developments in the shafts referred to, that this supposed vein was continuous underneath the placer claim, and also that the larger part of the community in that mining district did not suppose the vein cut and exposed in said shafts adjoining the premises, extended underneath such placer claim; and then the jury, we presume, would be asked to decided what was the prevailing opinion of the witnesses and the community as to this geological supposition of the extension of a mineral vein for a mile or two under ground, because it had been cut and exposed in a few shafts adjoining the placer claim.

We will not pursue this illustration further.

We may be pardoned for saying that when patent titles to mining claims, or any titles to mining claims, depends upon trying issues of fact before juries and courts on such testimony, the trial will be more of a farce than a judicial investigation.

The above character of evidence is not imaginary, but will be found in the record on pages 50 to 57 and 60 to 69.

In an application for an injunction, made in a case before the Honorable Circuit Judge, at the time he rendered the decision in the case of the Iron Silver Mining Company vs. Sullivan, 5 McCrary, page 274, above cited, and in which the question of the rights of a lode claimant, who had attempted to locate within the boundaries of said placer patent after the patent issued, said lode claimant read a large number of affidavits to show that a geological supposition, or opinion, existed before the application for and issuing of the said placer patent, that such lode or vein extended underneath the surface of the placer claim. The affidavits in that case supported the theory of the lode claimants, which was so thoroughly overruled by the decision of the Circuit Judge referred to. But in this case, plaintiffs in error have not the excuse of even claiming to own at any time, before or after patent, any lode claim or vein or lode, within the boundaries of the placer claim.

Counsel for plaintiffs in error, in discussing this question of what is granted and reserved by the placer patent, seem to proceed upon the theory that the United States intended to reserve to itself out of the placer grant, any mineral deposits of rock in place found within the boundaries of the placer claim, so that persons or prospectors could thereafter go within the patented premises and prospect for and discover lodes and veins, and locate mining claims upon it. This theory is expressly negatived by the last clause of said Section 2333, in the following language:

"But where the existence of a vein or lode in a placer "claim is not known, the patent for the placer claim shall "convey all valuable mineral and other deposits within the "boundaries thereof."

We have attempted to show that a lode or vein cannot be legally known in any other way than by discovery, location and record, according to the statute. Any other pretended knowledge of the existence of a lode or vein is nothing but a geological supposition or opinion. And if

we should admit that a lode or vein actually cropped out in the premises, visible to the naked eye, no legal rights could be acquired to it by any person that would enable him to go into court and set it up, and contend against a patent, or to show that he came within the reservation clause of a patent, unless he had located and recorded such claim according to law, and thereby acquired some standing or legal right against the Government or the patentee.

But it will be seen by an examination of said Section 2333 that the literal language of it is "lode and vein mining claims," and not simply "veins or lodes." It will be seen that the terms "vein or lode" and "vein or lode claims" are used synonymously and interchangeably; as stated by the learned Circuit Judge in his opinion; "The term 'vein or "lode' occurs four times and the term 'vein or lode claim' "occurs four times in this Section; they are used inter- "changeably in the same sentence."

That particular portion of the section which expressly provides for a reservation of lode claims, if the applicant for the placer patent does not apply for them in his application for the placer patent, contains the language:

"Any application for a patent for such placer claim "which does not include an application for the vein or lode "claim, shall be construed as a conclusive declaration that "the claimant of the placer claim has no right of posses- "sion to the vein or lode claim."

That is, if the placer claimant does not apply for the lode claim that has before been located and recorded within the boundaries of his placer claim, it is construed as a declaration that he does not own, or have any right to such lode claim.

How can a placer claimant be estopped from thereafter setting up title to a lode claim claimed by some one else, because he did not apply for a patent for it with his placer application, if no lode claim existed? If counsel will explain how the applicant for the placer patent could incorporate an auxiliary application for a lode claim in his appli-

cation, which had not been located, recorded or developed, they will make clearer their theory of the case. No application for a patent for a vein or lode will be entertained by the land office, auxiliary to an application for a placer patent, or otherwise, unless it is supported by proof of discovery, location and record, and that five hundred dollars worth of labor has been performed upon it, and an abstract of title must be filed, showing that the applicant is the original locator, or a grantee by a legal chain of title.

Plaintiffs in error propose to estop defendant from setting up title to any mineral deposit of rock in place, because they did not include in the application for a placer patent, also an application for a vein or lode claim, that did not exist; for the most they claim, or set up in their answer, is that there was an opinion, or geological supposition that a lode or vein of rock in place existed underneath the surface of the placer at the time of their application, which they could have discovered and recorded, and done five hundred dolars worth of work upon, and they could have applied for a patent for such lodes or veins of rock in place with their application for placer patent. Or, do counsel contend that the applicant for the placer patent should have stated in an auxiliary application, that he believed that there was a lode or vein of rock in place existing several hundred feet beneath the surface of such placer claim, and extending throughout the claim, according to the opinions advanced by those witnesses, and that he desired a patent both for the placer surface, and for such supposed lode deposit? Any logical reasoning to a conclusion from the theory, or construction of the statute insisted on by plaintiffs in error, lead to just such absurd conclusions.

Most certainly, where the existence of a vein or lode within the placer was not known by the facts that it had been discovered, located, recorded and boundaries marked and developed by labor, and claimed and owned by some third party, the patent for the placer claim conveyed all

valuable deposits therein, as stated in the last clause of said Section 2333.

The Commissioner of the General Land Office has construed the reservations in patents for town sites under the provision of Sections 2386 and 2392 of the R. S. U. S., which confirms the construction and views we contend for.

See 9th Copp's Land Owner, page 147.

In this case the Commissioner decides that the terms "mines of gold or silver," found in said Section 2392, mean known mines, discovered prior to the issuing of the town site patent. In other words, that these reservations are to protect the prior rights of miners or of third parties, who have before located, recorded and developed mining claims within the limits of the town site, or placer patent, as the case may be.

And the Commissioner well says, that practically no other than prior discovered and known lodes, can be excluded from the patent, because the U. S. Statutes in Section 2318 only allows locations of mining claims to be made on the land belonging to the United States, and then says that this land does not belong to the United States, because a town site patent had been issued therefor, and persons thereafter going upon the patented lands for the first time, would be naked trespassers.

The late learned Secretary of the Interior, Mr. Teller, who has had much experience in mining law, and in construing mining statutes, takes the same view in several of his decisions.

In the Rico town site case, reported in 9th Copp's Land Owner, page 91, July, 1882, the Secretary held, that the adverse claimants in that case, who were protesting against the issuing of the town site patent, showed no legal rights against the town site claimants, because their proof did not show that the lode claims which they sought to have excepted from the patent, had been discovered, located, re-

corded and developed, before the application for the town site patent, and the Secretary decided that the same proof of discovery, location, record, development, etc., must be made as would be required to show a possessory preemption title, in a court of law, before the parties had any rights against the applicants for the town site patent under the provisions excepting mines of gold, silver, etc., from town site patents, contained in Sections 2386 and 2392.

The Secretary says:

"The protestants did introduce location certificates of "lodes, and in connection with such lodes, mill-site loca- "tions, but there is no evidence that the lodes were taken "in accordance with law; it does not appear that the locator "complied with the local laws and United States Statutes con- "cerning such location and the development of such lodes. "Proof of location, and compliance with the law concerning such appropriation, ought to be the same that "would be required in a court of justice, to establish a title "to such lode claim and mill site. In this, the protestants "have signally failed."

For want of this proof, the Secretary held that the mill site and lode claimants had acquired no legal rights before the application for the town site patent, and hence do not come within the reservations provided for in said Sections 2386 and 2392.

And so we contend in answering the third proposition of counsel on page 6 of Patterson & Thomas' brief, that the placer patent conveys all the land and mineral deposits within its exterior boundaries, except lode claims which had been located and recorded and held in accordance with the United States and State Statutes before the date of the application for the patent, and we shall hereafter contend that the rights of such lode claims must be established in the land office, and they be excepted from the patent before its issuance, or the parties are forever barred from asserting title to them.

In the case of Robinson vs. Royer, 10th Copp's Land Owner, page 18, decided March, 1883, the Secretary decides

that the question of the existence of a known lode within a placer claim, if controverted, must be decided by the court in an adverse claim suit. How could the question be decided in a suit between the parties claiming the right to have a placer patent issued, and the parties who claim to own the lode or vein at or before the date of the application, except by proving before the court that the lode claim had been located and possessed in accordance with the Statutes before the application for the placer patent.

This case arose in a proceeding in the land office, where a party applied for a patent for a lode claim fifty feet wide, within the boundries of a patented placer claim. The applicant offered proof to show that he owned and possessed a lode claim, located and recorded within the placer claim, before the application for the placer patent. This was disputed by the patentee, and the Secretary decided that under the provisions of Section 2326, it must be determined by the local courts whether the applicant for the lode claim had discovered and located his claim before the application for the placer patent. We shall hereafter contend that a lode claimant in such a case waived his rights by not filing an adverse claim under Section 2326, and bringing a suit in court to determine his rights and have them excepted from the placer patent before its issuance.

Attorney General McVeagh decided in the case of Fort McGinnis Military Reservation, reported in 8th Copp's Land Owner, page 137, in December, 1881, that the reserved rights of the miners in the land set apart for the Indian reservation, *means rights to mining claims duly located and held under the United States laws, before the date of the setting apart of the reservation.*

In the case of Chief Moses Indian Reservation, 9th Copp's Land Owner, page 189, decided December, 1882, the Honorable Commissioner of the Land Office, follows this decision and comments upon it.

In the case of the War Dance Lode vs. The Church

Placer claim, 9th Copp's Land Owner, page 212, decided in February 1883, the Secretary of the Interior decides that a lode discovered and located within the boundaries of a placer claim, between the time of the application for the placer patent and the date of issuing the patent, is not excluded or reserved from the placer patent grant.

In the case of Becker vs. Sears, a lode against a placer claim, 9th Copp's Land Owner, page 211, decided in January 1883, the Secretary decided that a lode must be known before the date of the application for patent, or it is not excluded by its provision. That is, it must be known by having been discovered, located upon and recorded, as required by the statutes, to give any right or title to it.

A lode or vein, in legal parlance, in this mining country, universally means, a lode or vein which has been discovered, located and recorded as a lode mining claim; as above herein we have attempted to show, it could be legally known or possessed in no other imaginable way.

We submit that by all the authorities, and all the reasoning, from any principles of law that have been laid down by the courts of this country, said Section 2333 of the statute, attempts only to reserve or protect the rights of third parties to lode claims, which existed and were owned by discovery and record before the date of the application for the placer patent; and that there is no attempt, by the reservation clauses in a placer patent, to reserve from the grant, any character of mineral deposits in which third parties had no rights by discovery and location before the date of the application. This would seem to be too plain for argument, was the contrary not contended for so earnestly and at such length, by the learned counsel for the plaintiffs in error.

It has never been the policy of our government to reserve or except out of grants to land anything of any kind to itself. It has only sought in a few instances to protect and recognize the prior preemption, or other possessory

rights of third parties, within the exterior boundaries of grants. We contend that the United States has never in any instance reserved any rights or interest to itself out of any grant of land it has made. The policy of this government has been just the opposite from the governments of other countries, in that regard. This Court has always held, where those questions arose regarding the title to mineral veins and deposits found within the private grants, in California, after the treaty of Guadalupe Hidalgo, that where the private grant or title had been confirmed by the issuing of a patent by the United States, that it carried the surface, and all mineral deposits beneath, even though according to the laws of Mexico, the grants had been of a character to convey only the surface, distinct from the mines. If the Court should hold, as contended by plaintiffs' counsel, it would be deciding that Section 2333, entirely revolutionizes the policy of the government in its conveyance of its public domain to individuals.

So we say, in the issuing of placer patents, the Government does not attempt to reserve to itself any deposits of rock in place, out of the grant, but has attempted to protect the prior rights of third parties who own and possess lode claims under the law, within the exterior boundaries of the placer claims, at or before the date of the application for the placer patent; provided such claimants file their adverse claim under Section 2326 and bring suits in the local courts, to determine their rights and have their lode claims excepted from the grant of the patent, in accordance with the judgments they may obtain.

To show a possessory title to a mining claim in any court, or in the Land Office, it is necessary to aver and prove that such claim has been located upon a vein of quartz, or other rock in place before discovered, and also necessary to show that the claim is located upon the top or apex of such vein or lode. Section 2320, before cited, requires the claim to be upon a vein or lode of quartz, etc., and grants to such

locator the exclusive right of possession of the surface, and all veins, lodes and ledges throughout their entire depth, the tops or apexes of which lie inside of such surface lines extended downward vertically. This statute grants the right of possession of a mining claim, only upon the condition that it is located upon the top and apex of a vein or lode, and the fact that it is so located upon the top or apex, must be averred and proved, to show a possessory or preemption title.

In the case of Patterson vs. Hitchcock, 3 Colorado, page 533, it is decided, that if the top or apex of the vein attempted to be located, departs from the boundaries of the claims, the title is defeasble, if not void. So, if the plaintiffs in error are contending in this case for a mining claim, located within the boundaries of the placer patent, they could show no valid right to come within the reservation of the patent, unless they show they had located a mining claim upon the top or apex of a vein or lode.

Of course, the question of whether the United States was in any way defrauded by the issuing of this placer patent, cannot be considered in this case, as was clearly stated by Judge McCrary in his opinion in the Sullivan case, attacked at such length in the argument of counsel.

This is a suit between private citizens, and if it be contended that this placer patent does convey some mineral deposits found beneath the surface, which under the law ought to have been reserved to the United States, for prospectors or miners, in the future to prospect and locate lode mining claims upon, a suit will have to be brought by the Government to avoid the patent. But parties who have acquired no possessory right on any pretence to even apply for or obtain a patent or grant, for any portion of the placer, cannot be heard to attack the patent collaterally.

We have argued this question more at length, because the opinion of the Circuit Judge upon the question, has been so laboriously attacked by counsel for plaintiffs. This

question was elaborately argued before Judge McCrary in that case, and the real question was involved in that decision. We have shown it is not involved in the decision of this case. We feel confident, that able and logical opinion cannot be successfully attacked, and that it does not need any argument or reasoning of ours to support it. We argued the case before the decision was rendered, and again in this Court, and if the Court thinks the construction of the reservation clause, inserted as the land officers seem to think, in accordance with Section 2333, is involved in this case, we are quite willing the question may be decided. It was not decided in this Court on the appeal in the Sullivan case, because the Court thought the question was not raised by the pleadings.

(See opinion of this Court 109 U. S., 550.)

We have thus argued the question in answer to plaintiffs' counsel, on the theory that the reservation clause in the placer patent, attempting to except lodes or veins from the grant of the patent, is valid and binding.

We now propose to contend and show that such reservation clause in the placer patent is void.

It is void for uncertainty, and it is void because the land officers had no jurisdiction to insert any such reservation in the grant.

The only way a lode claim can be reserved or excepted from a placer patent is, by the owner filing an adverse claim in the land office, against the issuing of the patent and commencing an adverse claim suit in the local courts, in pursuance of Sections 2325 and 2326, R. S. U. S.

In this, now familiar proceeding in the land office, and in our courts in the mining communities, the legal rights of all parties who claim to own the possessory title, or preemption right to a patent for any portion of the mineral public domain, must be judicially determined, and in no other way can they be determined. Before the Acts of July 26th, 1866, and May 10th, 1872, patents for land were

generally issued in *ex parte* proceedings in the land office, and in a few cases, the prior rights of certain third parties were reserved, or attempted to be, from the grants, in such a way that they might thereafter be asserted and protected in the courts, as against patents.

In some of the grants to states, the rights of prior pre-emption claimants, who had filed and settled on portions of the land included in the grant, before the date of the grant, and were reserved by reservation clauses in such grants and patents, so that such claimants could thereafter assert and have their rights protected in the courts.

But under the said mining statutes, we proceed on an entirely different theory and basis. Under these statutes, all conflicting rights of persons claiming preemption rights to patents to mineral land, must be determined in the land office and the local courts, before the patents issue, and the judgments of the courts are valid in issuing the patents.

The proceedings in the land office, in pursuance of said Sections 2325 and 2326, are in the nature of proceedings *in rem.* against all the world. The applicant for patent proceeds by a series of acts, which consist, in having the mining claim surveyed and the boundaries distinctly marked by monuments on the ground, posting a copy of the plat, with the copies of the application for patent, on the claim; before filing the application in the land office, a notice of the application must be published in a newspaper nearest the claim, and upon a bulletin board in the land office for sixty days, and if no adverse claim shall be filed by any person or persons, claiming any preemption right to any portion of the claim applied for, it shall be assumed that the applicant is entitled to a patent, and that no adverse claim exists, and thereafter no objection by third parties shall be heard, etc. If any person claims any right to any portion of the premises so applied for, he must file an adverse claim, setting forth his rights to the whole or any part of the land; and within thirty days thereafter, bring a suit in the

local court, to dertermine the possessory title to the land' which suit in effect, is for the purpose of determining who is entitled to a patent for the land, or any part of it. The Register shall certify the proceedings and judgment roll of the Court, filed in the land office, to the Commissioner, and patents must issue to the several parties, according to their respective rights.

The statute expressly says, that if no adverse claim is filed, it shall be assumed that no adverse claim exists, and no objection can thereafter be heard by third parties. These Sections 2325 and 2326, apply the same to applications for placer patents, as to applications for lode patents.

If parties claim any legal rights to any portion of a placer claim to which application for patent is made, they can only assert and protest their right or title to any portion of the land, by filing their adverse claim, obtaining the judgment of the Court, and having any portion of the land the Court adjudges to them, excepted from the survey and plat of the patent. If any parties claimed any rights in or to any portion of the Wells and Moyer placer claim, under the provisions of Section 2333, they could only assert and have their legal rights protected by filing an adverse claim against the application for said placer patent, bringing suits in the local courts in support thereof, and having their lode claims, or any other claims to the premises, adjudged to them and excepted from the survey and plat, and grant of the patent. It will be seen by an examination of this placer patent, and the shaded plat showing the ground patented, that there is no exception made within the exterior boundaries of the grant. How can any portion of the surface so patented, be thereafter excepted from the grant already made, except by a proceeding, on the part of the Government, to set aside the grant or a portion of it?

In the case of Cowell vs. Lammers, 21 Federal Reporter, decision by Judge Sawyer of the Ninth Circuit, it is held, that a similar reservation inserted in a patent, is void.

In the patent to the Central Pacific Railroad Company, in that case, was the following exception or reservation: "yet excluding and excepting from the transfer, by these "presents, all mineral lands, should any such be found to "exist in the tracts described in the foregoing."

A lode mining claim was located within the land, after the patent issued, and the parties sought to hold it under such reservation clause, claiming that it was expected out of the provisions of the patent grant. The Court holds, that there could be no exception to mineral lands thereafter to be discovered within the grant; that the land office had exhausted its jurisdiction in issuing the patent; that any one going within the exterior boundaries of the patent thereafter, were naked tresspassers, and could acquire no rights whatever, and as a result. said exception, or reservation clause was void.

The court further holds that it amounts to attacking the patent collaterally; that the granting clause of the patent included the whole tract, and to allow parties to recover any portion of the tract, by proving that it was mineral land, was avoiding the patent collaterally to that extent. That the defendant, in any event, was not in such a position to collaterally assail the title of the plaintiff, because it showed no preemption right or title as against the Government, citing,

Steel vs. Smelting Co., 106 U. S., 447.
Smelting Co. vs. Kemp, 104 U. S., 640–647.

The Court says:

"There must be some point of time when the character "of the land must be finally determined, and for the in- "interest of all concerned there can be no better point to "determine this question than at the time of issuing the "patent. The Supreme Court has not yet had occasion to "decide the point as to the effect on a patent of a dis- "covery of a valuable mine in lands subsequent to the "issue of a patent. Any other construction would be "disastrous in the extreme to the holders of lands in Cali- "fornia under United States patents." (Page 206.)

Again the court says:

"There is no express authority, no provision at all re-"quiring or authorizing this exception to be repeated in the "patent. Lands patentable under the grant, and no others, "are authorized to be patented. If the exception in the pat-"ent is no broader in its signification in the Statute, it adds "nothing to or takes nothing from the effect of the Stat-"ute itself in this respect as to the effect of the patent issued "in pursuance of the Statute. If it is broader than the Stat-"ute, then it is wholly unauthorized by law, and as to the part "which goes beyond the Statute, at least, is utterly void. A "patent upon its face, should either grant or not grant. It must "be seen from a construction of the language of the grant itself "whether anything is granted or not, and if anything be "granted, what it is. There is no authority to issue a patent "which in effect only says, if the lands herein described here-"after turn out to be agricultural lands, then I grant them, "but if they turn out to be mineral lands, then I do not grant "them. Such a patent would be so uncertain that it would "be impossible to determine from the face of the patent, "whether anything is granted or not."

And the Court holds that such exceptions have no effect upon the party's rights in any way.

We call the Court's particular attention to this learned and able opinion. It is decisive of the question we are now presenting.

The case of Clary vs. Hazlett, in the Supreme Court of California, reported in the 7th Pacific Reporter, page 701, cited in the brief of Counsel Morrison for plaintiffs in error, is somewhat in conflict with the last above decision, and our argument upon the proposition that the said reservation in the placer patent is void. But it is not at all in conflict with our position, presented somewhat at length in this brief; that if the reservation clause in the placer patent is valid, it only applies to lode mining claims discovered, located and recorded within the boundaries of the placer before the application for patent.

Counsel say on page 13 of their brief,

"It cannot be told whether the lode was located before "the patent, or whether it was only a known lode, when "the placer patent issued."

The decision very clearly shows that the lode claim had been located and known before the application for the patent. The Court say that:

"The land upon which the alleged trespasses were "committed, consist of this quartz lode which was *located* "by the grantor of defendants in 1879, under the name of "the California Queen mine."

The court distinctly say that it was a located quartz lode, not simply a known lode, construing the phrase according to Judge McCrary's opinion.

We might pursue this argument by answering in detail, many arguments advanced by counsel, in attempting to show that there was no error in refusing the instruction asked by them. But we submit that the charge of the Court entirely covered the law of the case, and that if the Court's charge is correct, there was no error in refusing the instruction requested.

The law contained in the charge of the court may be stated in a few words. (1) That the placer patent conveyed the *prima facie* title; (2) that the defendants below could not follow the vein under the patented ground, because they had no top or apex, and because they had not laid their claim in the direction of the strike or trend of the lode, but across it; (3) therefore, the defendants were naked trespassers, having shown no right whatever to contest the grant, or even a *prima facie* title of any kind, or possessory title of the plaintiffs to the ground in controversy. We think all the facts and all the law of the case, fully sustain the charge of the court.

The point made by counsel, that the plaintiffs must recover on the strength of their own title, has no application to the case. If it was not even held that the placer patent conveyed *prima facie* title to that part of the ground in controversy, which seems practically indisputable, still it will be seen from the evidence of witnesses White and Robinson, page 71 and 72 of the record, that the plaintiff had

had actual possession of the ground in controversy since 1878. Certainly a possessory title is sufficient, aside from the patent, to maintain an action against naked trespassers.

To recapitulate, we have attempted to show that the plaintiffs in error have not even a legal pretense for following the vein into the defendant's land; (1) because they produce no patents showing any granting clauses giving any such right in any event; (2) because they show no top and apex within their lode claims; (3) because the evidence shows that the vein dips towards the end lines of the claim and not out of the side lines, and that the lode claims are laid across the trend and strike, or course of the vein, instead of following such course, so that the side lines practically become the end lines of the claim; (4) that the placer patent in any event carries all mineral deposits not included in any lode claim within the boundaries of the placer before the date of the application if the reservation clause is not void; and (5) that the reservation clause, which attempts to reserve lodes or veins is void because it is not excepted from the grant in any legal way, and because such prior rights could only be asserted before the date of the issuing of the patent by an adverse claim and a suit in support of it. Any other rule would unsettle all patent titles and make them more uncertain, if possible, than the mining, preemption or possessory titles.

Most Respectfully submitted.

G. G. SYMES,

Of Counsel for Defendant in Error.

Sup. 911

Office Supreme Court U. S.
FILED.
DEC 29 1885
JAMES H. McKENNEY.
CLERK.

SUPREME COURT

OF THE

UNITED STATES

October Term, 1885.

JOSEPH REYNOLDS AND
JOHN D. MORRISSEY,
Plaintiffs in Error,

VS.

THE IRON SILVER MINING CO.,
Defendant in Error.

Error to the Circuit Court, of the United States, for the District of Colorado.

Brief and Argument for Defendant in Error.

HUGH BUTLER,

Attorney for Defendant in Error.

DENVER, COLORADO:
C. J. KELLY, PRINTER, 406 HOLLADAY STREET.
1885.

SUPREME COURT

OF THE

UNITED STATES

October Term, 1885.

JOSEPH REYNOLDS AND
JOHN D. MORRISSEY,
Plaintiffs in Error,

vs.

THE IRON SILVER MINING CO.,
Defendant in Error.

Error to the Circuit Court, of the United States, for the District of Colorado.

HUGH BUTLER,
Attorney for Defendant in Error.

Brief and Argument for Defendant in Error.

I.

The statement of the case by the counsel for the plaintiffs in error, while in the main correct, is not entirely satisfactory, and as preliminary to this argument I make the following statement.

In the original complaint filed by the plaintiff below, (defendant in error) the plaintiff alleged:

"That on the 1st day of January, 1884, plaintiff com-
"pany was, and long before had been, and now is, the owner
"and seized and possessed of that certain tract of land and
"mining claim * * * 2d., that the said plain-
"tiff company claims an estate of inheritance, in fee simple,

"in and to said premises. 3d, that the said plaintiff com-"pany is now, and was at the times above and hereinafter "mentioned, entitled to the immediate and exclusive pos-"session of the above described land and premises. 4th, "that while the said plaintiff company was so the owner of "and seized and possessed and entitled to the possession of "said lands and premises, the said defendant afterwards, "and to wit: on the 1st day of May, 1884, entered upon a "portion of said premises" etc. (Folio 7.)

The defendants, in their answer, denied the plaintiff's title, or claim of title, and its possession or right of possession (folio 13) and then follows a statement of their second and third defences. In their second defence they aver that Reynolds, one of the defendants, was the owner, and in possession of the Crown Point and Pinnacle lodes and locations, which adjoined on the north the premises mentioned in the complaint, and that the vein or veins in said locations in their course downward dipped into and underneath the Wells and Moyer placer claim, and that they followed the same into the said placer claim as they lawfully might. Their third defence was that at the time of the survey, entry and patenting of the Wells and Moyer placer claim, the Pinnacle lode was known and claimed to exist in and underneath the said placer claim, and that this fact was well known to the grantors named in the patent, and to the grantors of the plaintiff. The answer also pleaded that the placer patent contained certain reservations and exceptions by reason of which they had the right to follow the Pinnacle lode on its dip in and underneath the surface of the placer claim. The replication denied all the substantial averments of the answer, and it also contained the following:

"That at all times heretofore charged in the answer of "the said defendants, it has been and still is the owner and "seized in fee of and in the actual possession of the Rock "lode mining claim and the Dome lode mining claim, "which adjoin immediately on the north side of the said "Pinnacle and Crown Point mining claims, and that within "the exterior boundaries of the said Rock and Dome lode "mining claims, there is a vein, lode, lead and valuable

"mineral deposit of quartz and other rock in place bearing "silver and lead, and which has its dip, apex and outcrop, "or highest end, within the exterior boundary lines of the "said Rock and Dome mining claims, and which said lode, "vein, lead and valuable mineral deposit on its dip and "downward course enters into and underlies the land ad- "joining, a portion of which land adjoining consists of "ground covered by the said alleged Crown Point and Pin- "nacle lode mining claims. And the plaintiff company "avers that any portion or part of any vein, lode, lead or "valuable mineral deposit of any kind, which is found or "developed underneath the surface of the said Crown Point "and Pinnacle lode claims, is a part and portion of the "said Rock and Dome lode claims and mineral deposits "which have their dip, apex and outcrop within the exte- "rior boundary lines of the said Rock and Dome lode "mining claims, and which dip, as aforesaid, on their down- "ward course into the said Pinnacle and Crown Point lode "mining claims." (Folios 20 and 21.)

In the course of the argument of counsel for plaintiffs in error an attempt is made to show that the defendant in error was not entitled to recover under the pleadings. It is said that a party cannot be allowed to plead one title and prove another, and authorities are referred to in support of the proposition. That general proposition is not denied, but it is not at all applicable to this case, and the authorities cited do not sustain the position taken by counsel for the plaintiffs in error. The action was not strictly one of ejectment, nor was it trespass. The first was always the appropriate remedy for the party out of possession and the latter for the party in possession. So long as the distinction between the forms of action as at common law were observed the rules belonging to each were rigidly adhered to, but the common law system of pleading in Colorado was superseded in 1877, and a code quite similar to that of California was adopted in this State. The remedy resorted to in this case was provided by that code, and it is not important to determine whether it may be denominated an action of ejectment or of trespass. In some respects it is analogous to both. An action for the determination of

title to real property may be brought by a party in or out of possession and against a party in or out of possession.

Colorado Code of Civil Procedure, Chapter 23, Sections 267, 268 and 269.

The reason which gave birth to the old rule in the action of ejectment does not exist in such a case as this. In the former case a suit was brought by the party out of possession and against the one in possession. The defendant, unless a naked trespasser, was in possession under some claim and color of right and his adverse possession was frequently of long duration. Possession in such cases was presumptive evidence of title, and sometimes of title in fee.

Greenleaf on Evidence, Sec. 331.

And public policy and sound reasoning forbade that such presumption should be overcome, or the possession changed, except at the instance of the true owner. But the nature of the remedy, the pleadings and the facts of this case are wholly different from the case supposed, and the reason for the rule contended for does not exist. The plaintiff and its grantors were the owners of the premises mentioned in the complaint since July 22, 1878, and they had possession of the same from that time until disturbed in the early part of the year 1884. The ouster by the defendants was only of a small part and that underneath the surface of which the plaintiff had possession. The action was brought under the code to protect its prior possession and to vindicate the title under which it was claimed. The complaint not only averred the possession, but also described the right by which it was held. According to the facts in the case, title could not have been alleged in a different way. The question, therefore, is not one of pleading, but whether the title proved entitled the plaintiff to recover.

It is also said that the plaintiff must recover on the strength of its own title and not on the weakness of the

defendants. This proposition is simply the outgrowth of the other, and it is equally inapplicable to the present case. The plaintiff at the time of the ouster by the defendants had possession, and that possession was sufficient to enable it to recover as against a mere transpasser.

Burt vs. Penjaud, 99 U. S., 180;
Campbell vs. Rankin, *id.*, 262.

If the defendants, when they encroached upon the possession of the plaintiff, were not trespassers, their entry must have been under a perfect right and title, and the burden of proving that right rested upon them. The *onus probandi* was shifted and so long as they sought to justify their entry it remained with them. This brings us to the consideration of the main question.

II.

The first question stated by the counsel for the plaintiff in error is:

"Whether a patent to a placer claim under the act of "Congress of May 10, 1872, conveys all known deposits or "veins in rock in place which has not been discovered and "located as lode claims at the time of the application for a "patent to such placer claim; or whether all such deposits "or veins known or claimed to exist at the date of such "patent are excepted from the ground thereof; or whether "at the time of such application they were located as lode "claims or not."

It will be observed that the limitation sought to be applied to the patent refers to two dates: the first being the application for patent, which must have been as early as May 22, 1878, and the second, the date of the patent itself, March 11, 1879, a difference in time of nearly ten months. And attention is called to the circumstance, that by the action of the Interior Department, the exceptions and reservations in regard to known or unknown veins or lodes, relate to the date of the patent. It is argued that the language of the conditions shows the construction of the law by the Interior Department; and secondly, that no

matter what may be the correct construction of the statute, the patentees and their grantees are bound by the reservations and restrictions contained in the patent. That is to say, if the Secretary of the Interior, without authority of law, and by a misconstruction of the statute and misconception of his duty, imposed conditions and reservations not authorized by law, they are, nevertheless, to remain in full force and to be regarded as a part of the patent. No argument can be needed to demonstrate the fallacy of this pretension. It has been repeatedly decided by this Court, that when a patent is issued for property, or in a case not authorized by law, it is absolutely void, and can be attacked directly or collaterally in any proceeding.

Sherman vs. Buick, 93 U. S., 216.

True, this doctrine was announced in a case affecting the validity of an entire patent, but the same principle must apply to all void or unauthorized acts of public officers in connection with the issuing of letters patent.

Clearly, if the conditions and reservations framed and inserted in the patent by the officials of the Interior Department had fallen short of the statutory provisions, the patentee could not claim or enforce a right broader than the statute under which his patent was issued. The argument of the learned counsel in this respect is not consistent with other propositions laid down in their brief. They say:

"The exception and exclusion are absolute. They are "something more than a reservation, and to use the lan-"guage of Mr. Washburn, stand as though the relations of "the parties were reversed, the grantor becoming the "grantee."

The Government is the grantor. Pursuant to law in recognition of a right and as a matter of duty its authorized officials issue a patent. What right have the officials to make any grant or concession on the part of the grantee? Can the Secretary of the Interior by a mistaken

construction of the statute carve out of the estate granted, a right or interest, and convey that either to the Government or any of its citizens? The question answers itself. I will assume, therefore, that the question is to be determined by referring to the statutes themselves, and so far as the construction by the Secretary of the Interior is concerned, it may be said that the ruling of the Interior Department upon the various questions arising out of the mining acts of 1866 and 1872 have not been uniform, nor have they been of such duration as to make them controlling.

United States vs. Graham, 110 U. S., 221.

III.

I propose now to consider the effect of the various sections of the Act of 1872, in regard to lode and placer claims, because neither can be fairly discussed without constant reference to the other. First, it is declared, "that "all valuable mineral deposits in lands belonging to the "United States, both surveyed and unsurveyed, are hereby "declared to be free and open to exploration and purchase "* * * under regulations prescribed by "law and according to the local customs and rules of min- "ers," etc. (Section 2319).

The words "valuable mineral deposits" include everything. They are more comprehensive than the terms lode claims or placer claims, because they include both and more.

Then it is said:

"A mining claim (presumably lode claim) located after "the 10th day of May, 1872, whether located by one or "more persons, may equal but shall not exceed 1,500 feet "in length along the vein or lode, *but no location of a vein "or lode shall be made until the discovery of a vein or lode "within the limits of the claim located.*" (Section 2320).

According to the section quoted, two things are required to make a lode claim: first, the discovery of a lode or vein in the location; and, secondly, the location or designation of the ground within which it has been discovered.

Again, while it is declared that the miners of each mining district may make regulations, not in conflict with the laws of the United States or the State or Territory, governing the manner of location, etc., that power is subject to the following regulations:

"The location must be distinctly marked on the ground "so that its boundaries can be readily traced. All records "of mining claims hereafter made shall contain the name "or names of the locators, the date of the location and "such a description of the claim or claims located, by ref- "erence to some natural object or permanent monument as "will identify the claim." (Section 2324).

Thus the local legislative power may superadd to many of the regulations, but they cannot dispense with any in regard to the *discovery, location, marking of the boundaries and the making of such description as will identify the claim.* It was doubtless competent for the local authority to declare what should constitute a discovery so long as the acts prescribed did not fall short of an actual discovery, and that power was fully exercised in this territory.

In 1874, at the first session of the Legislative Assembly, after the passage of the Act of 1872, a statute was passed in conformity with it. It enacted among other things, as follows:

"Sec. 5. Before filing such location certificate "the discover shall locate his claim by first sinking a "discovery shaft upon the lode to the depth of at least 10 "feet from the lowest part of the rim of such shaft at the "surface, or deeper if necessary to show a well defined "crevice; second, by posting at the point of discovery, on "the surface, a plain sign or notice containing the name of "the lode, the name of the locator and the date of dis- "covery; third, by marking the surface boundaries of the "claim."

"Sec. 6. Such surface boundaries shall be marked by "six substantial posts headed or marked on the side or "sides which are in toward the claim and sunk in the ground, to-wit: one at each corner and one at the center of each side "line. Where it is practically impossible on account of bed

"rock or precipitous ground to sink such posts, they may "be placed in a pile of stones."

"SEC. 7. Any open cut, cross-cut or tunnel which "shall cut a lode at the depth of ten feet below the surface, "shall hold such lode the same as if a discovery shaft were "sunk thereon, or any cut of at least ten feet along the lode "from the point where the lode may be in a manner discov-"ered, shall be equivalent to a discovery shaft.

"SEC. 8. The discoverer shall have sixty days from "the time of uncovering or disclosing a lode to sink a dis-"covery shaft thereon."

Session Laws of Colorado Territory of 1874, pages 186 and 187.

That act has remained in force ever since. The last section was construed and its effect stated by this Court in Erhardt vs. Boaro, 113 U. S., 527.

In 1878, at the time of the entry of the placer location there could not have been a mining claim unless a vein or lode had actually been discovered, located, staked, described and the location certificate thereof duly recorded, and this certificate could not have been recorded until the discovery shaft had been sunk to the depth of ten feet or more showing a well defined vein or lode. Until all these things had been done, the claim had no legal existence, because a complete discovery was an essential prerequisite to the location, and the discovery was not complete until the required amount of exploration and development had been done. Until then no lode or vein in contemplation of law was known to exist.

The next section in the order of consideration is in regard to placer claims, which is Section 2329, and which is as follows:

"Claims usually called placers, including all forms of "deposit, excepting veins of quartz or other rock in place, "shall be subject to entry and patent under like circum-"stances and conditions, and upon similar proceeding, as are provided in lode claims," etc.

If the section stood alone, it might be contended that

the placer patent could only convey "all forms of deposit, except veins of quartz or other rock in place," but it is followed by Section 2333 on the same question, a reference to which is necessary to obtain the full meaning of Congress. It is as follows:

"Where the same person, association or corporation is "in possession of a placer claim, and also a vein or lode in- "cluded within the boundaries thereof, application shall be "made for a patent for the placer claim with the statement "that it includes such vein or lode, and in such case a pat- "ent shall issue for the placer claim, subject to the provis- "ions of this chapter, including such vein or lode, upon the "payment of five dollars per acre for such vein or lode claim "and twenty-five feet of surface of each side thereof. The re- "mainder of the placer claim, or any placer claim not embraced "in the vein or lode claim, shall be paid for at the rate of "$2.50 per acre together with all costs of proceedings, and "where the vein or lode, such as is described in section "2320, is known to exist within the boundaries of the placer "claim, an application for a patent for such placer claim, "which does not include an application for the vein or lode "claim, shall be construed as a conclusive declaration that "the claimant of the placer claim has no right of possession "of the vein of lode claim, but where the existence of a vein "or lode in a placer claim is not known, a patent for the "placer shall convey all valuable mineral and other deposits "within the boundaries thereof."

I will construe both as if they constituted but one section. It was well known at the time of the passage of the Act of 1872, as has been more fully demonstrated by experience since, that in many places particular portions of the mineral lands on the public domain were frequently difficult and sometimes impossible of classification. There were gulch claims, bar claims, lode or lead claims, placer claims and other and nondescript classes of mineral deposits. They were not separated from each other by natural boundaries or great distances, and a comparatively small section of ground might perhaps have been subdivided into gulch claims, in the bed or channel, bar claims on or near the bank, and placer claims still farther from the channel

but contiguous to it. It would be difficult in many cases to draw the line of demarcation and to say where one ended and the other began. Under or through all of them a lode might be found and generally in a considerable quantity of mineral ground whether called gulch, bar or placer, lodes or veins, were likely to be found by exploration in pursuit of what miners term "indications." Congress, of course, had some knowledge of this state of facts and knowing that the increased development of our mineral lands might develop new conditions legislated accordingly. It knew that a lode mine was comparatively well defined; and it provided clearly and specifically how title could be acquired thereto, It provided that the owner should be entitled to a certain amount of ground on each side of the vein, and knowing also that such a vein in its downward course was likely by its dip to continue into the land adjoining, it gave the right to follow the lode on its dip through its entire depth, even into the land adjoining. This right was given to all lodes theretofore duly discovered and to all lodes that might be thereafter duly discovered, located, staked, described and recorded. Having disposed of that question, it proceeded to provide also for placer claims. Assuming that lodes might also exist thereunder, it also gave a title to so much of them as might be found within the exterior boundaries of the claim, but not outside by dip or otherwise. This gave to the placer owner only all the mineral, no matter what might be the nature of it within the exterior boundaries of the placer location. The effect was to say, that mineral ground containing valuable mineral deposits in which no lode or vein or quartz in rock in place had been theretofore found or discovered was open to location and appropriation as a placer claim. It might be in such a case that the formation of the ground, its surface indications or its proximity to other ground containing lodes or veins would give rise to the belief, more or less positive, that a lode or vein also existed in the adjacent ground, but

the circumstance would not forbid the location and appropriation of the ground as a placer claim. In such a case opinions might differ. The difference of opinion depending on the knowledge, experience and characteristics of different miners. If the words "known to exist" be taken in their broadest sense, there would be no certainty in many cases. The claimant, although satisfied that no lode or vein was known to exist, because not discovered or proved in the required way and although making the location in perfect good faith, would always be in peril, because in years after his location, entry and patenting, some person or a number of persons might come forward and assert that they knew of the existence of the lode or vein in the ground before the location of the placer claim. On the other hand, if a more definite meaning be affixed to the words "known to exist," confining them to lodes actually discovered and located, there will be but little if any difficulty or uncertainty.

The discovery of a lode, contemplated by the statutes, Federal and State, consists of more than the mere act of finding or first seeing. It is the result of a series of acts, and if the lode have sufficient value to satisfy the discoverer, it is followed by appropriation and location.

In speaking of this question, this Court has said:

"This allowance of time for the development of the "character of the lode or vein does not, as intimated by "counsel, give encouragement to mere speculative loca- "tions, that is, to locations made without any discovery "or knowledge of the existence of metal in the ground "claimed, with a view to obtain the benefit of a possible "discovery of metal by others within that time. *A mere "posting of a notice on a ridge of rocks cropping out of the "earth, or in other ground, that the poster has located thereon "a mining claim without any discovery or knowledge on his "part of the existence of metal there or in its immediate vicin- "ity, would be justly treated as a mere speculative proceeding, "and would not itself intimate any right. There must be "something beyond a mere guess on the part of the miner to "authorize him to make a location which will exclude others*

"*from the ground, such as the discovery of the presence of the* "*precious metals in it, or in such proximity to it as to justify a* "*reasonable belief in their existence. Then protection will be* "*afforded to the locator to make the necessary excavations and* "*prepare the proper certificate for record.* It would be difficult "to lay down any rules by which to distinguish a speculative "location from one made in good faith with a purpose to make "excavations and ascertain the character of the lode or vein, "so as to determine whether it will justify the expenditures "required to extract the metal," etc.

Ehrardt vs. Boaro, 113 U. S., 536.

If any person, other than the placer claimant, be the owner of a lode actually discovered, located, bounded and described, it will not be included in or affected by the application for a placer patent. His location may be wholly surrounded by the lines of the placer survey, and yet he will be wholly unaffected. He will not be required to file an adverse claim, or to assert his title in any way. The law clearly protects and exempts his lode claim from the placer patent. If the placer owner attempt to claim any thing more, he must also discover a vein or lode, sink a discovery shaft to the required depth, stake, bound, mark, describe and record his claim like any other lode claimant. Should he do so, he may include it in his application, and if he obtain a patent therefor, he acquired a right to follow that vein according to its dip, though it may enter the land adjoining. If he has discovered and found such a lode, and fails to include the same in his application, he only retains his possessory title to the lode. This construction protects all and injures none, and is perfectly consonant with the letter and spirit of the statute. It is not necessary in an application for a placer patent to include an application for the vein or lode, unless it be one discovered and located as before stated. The language of the statute upon that question is to be found in the middle of Section 2333. The words are:

"And where a vein or lode, such as described in Sec- "tion 2320 is known to exist within the boundaries of a

"placer claim, an application for a patent for such placer "claim which does not include an application for the vein "or lode claim, shall be construed as a conclusive declara- "tion that the claimant to the placer claim has no right of "possession to the vein or lode claim."

The vein or lode mentioned is one which is not only "known to exist" but is one which has been duly discovered, located and recorded, so described that it can be easily identified, and so marked upon the surface that its boundaries can be readily traced.

This standing by itself seems to be clear enough, and as there is nothing elsewhere in the statute of contrary meaning, it would seem to be conclusive. This question was passed on by Judge McCrary in Iron Silver Mining Company vs Sullivan et al., 5 McCrary, 274.

Counsel for the plaintiffs in error say that the case is not in point, because it was in the case of a subsequent locator of a lode claim involving some claim to a part of the surface. It is difficult to see any distinction. The logical effect of the doctrine contended for here by the plaintiffs in error, would give to a subsequent locator of a known lode, a right not only to the vein, but to the ground appurtenant to it. While the case differs in some of its features from the one at the bar, the contention was the same, and the learned judge found it necessary to construe, and did construe the various sections under discussion in this case. The reasoning of that case is so clear, strong and satisfactory that I will not attempt to add to it, and I am content to cite it with confidence and without further comment. To show, however, that Judge McCrary was not alone in his opinion, I may cite Judge Sawyer in Mining Company vs Spargo, 8 Sawyer, 646.

IV.

The learned counsel for the plaintiffs in error, for the purpose of giving plausibility and dignity to their argument, speak in glowing terms of the beneficient purpose of the

government in providing for the appropriation of the mineral lands on the public domain, and attempt to show that the policy of the Government was to favor lode claimants, because their claims are comparatively small as against associations and corporations appropriating larger areas under placer locations. And for the purpose of making the case of the defendant in error as offensive as possible they say:

"The defendant in error as a matter of fact counts its "mineral domain in Lake county by the thousands of acres, "nine-tenths of which has been acquired by placer patents "similar to the one under consideration, and it will not be "pretended that it ever even attempted to develop any of "its placers, save to work and mine the ores from the lodes "and deposits contained within their boundaries. Such an "abuse of the privileges given by the Government to its "citizens should if possible be punished more severely than "by a rigid enforcement of the exceptions contained in the "patents which have been issued by the President and "under which its wrongs are sought to be justified."

The statement so far as it pretends to be a statement of fact is not only gratuitous and one not borne out by the record, but, as the writer is informed, substantially incorrect. The defendant in error did and does own large quantities of mining property, situate in Lake county, both as lode and placer claims, which it acquired by purchase, and it claims only the common and ordinary right to buy what it can pay for, and to defend the title to that which it has purchased and paid for. It is said by counsel for plaintiff in error:

"That while both (lode and placer ground) are equally "open to location, the title to one can be secured in a com- "paratively small quantity at $5 per acre, and to the other "in a comparatively large quantity at $2.50 per acre, yet if "the decision of the court below be sound, individuals, cor- "porations and associations are at perfect liberty to acquire "the fee to lode claims in unlimited quantities at fifty per "cent of what the Government should receive, therefor were "the intentions and objects of the statute observed and en- "forced."

The statement is an exaggeration and the supposed grievance greatly magnified. According to the laws of this State in force, where the property in controversy is situate, a lode claim may consist of 1,500 feet in length by 300 feet in width. The area of such a claim is about 10¾ acres. All of this may be appropriated by a single person or locator. A placer claim for each individual claimant consists of 20 acres, a trifle less than twice as much as that allowed for a lode claim. If revenue from the sale of the public mineral lands was the objeet, or one of the great objects of the Government, it might be argued that it was realizing less under the one construction than the other, but that confessedly, according to the prevailing spirit of the argument throughout, was not the object of Congress. Compared to the supposed, and in nearly all cases, the actual value of the land, the price exacted by the Government for either lode or placer ground is the merest trifle. But when we apply this suggestion to the case under consideration, the result is still more insignificant. All the lode locations mentioned in the evidence in this case were on the same lode or vein. So far as the evidence goes there is but one lode within the placer location. If the grantors of the defendant in error had applied for a patent to the lode, or so much thereof as was not theretofore appropriated, they would simply have been required to enter and pay for as lode ground a strip of ground 1,500 feet in length by 50 feet in width, the acreage being about one and one-third acres, and the difference in price to the Government being about $3.10.

Whatever may have been the intention of the Government as regards revenue, it cannot be said that the placer claimants in this instance attempted to defraud it out of the paltry sum which represents the difference in price between placer and lode claims; nor are cases likely to arise where such difference in price gives a sufficient temptation to defraud the Government in that respect. Counsel also say:

"Under this decision individuals may find upon the "hitherto unprospected mineral domain, lode deposits 1500 "x 300 feet, which may contain sufficient metalic wealth to "exhaust cupidity. Yet, for the purpose of monopolizing "all that exists of the deposit, vast tracts may be located "and surveyed as placer claims, and the locators thereof, "with the full knowledge of the existence thereof, and for "the sole purpose of securing it, and conscious of the worth-"lessness of the placer location as such, may perpetrate a "deliberate fraud upon the government, and an equally "great wrong upon other citizens, and outrage the very ob-"ject and purpose of the statute, by applying for and secur-"ing a patent thereto. Then in the very face of the excep-"tions expressed in and by such patent, the holder thereof "may say to the subsequent locator of part of the depost, "'It is true that both you and I knew of the existence of "the lode when the placer was located and patent applied "for; it is true that I did not accompany such application "with the statement that it contained the lode; it is true "that by not thus including it within my application, I have "conclusively declared that I have no right of possession "thereto; nevertheless, since you did not at the time of my "application have a located and recorded lode claim within "the limits of my placer, you cannot have it now. It is "mine, though it has cost me but two and a half dollars per "acre. It is mine by the principle of statutory construc-"tion, and no power save that of the Government itself can "take it from me.' Such a consequence was never in-"tended."

The case evolved out of the imagination of counsel cannot have any existence in fact. Whenever any part of the mineral domain is known to contain a lode or deposit of sufficient magnitude and value as "to exhaust cupidity," the deposit will be discovered and located by some enterprising prospector and the placer claimant who comes after can only appropriate minus the limits of the valuable deposit.

If a placer seeker precede a lode prospector in his explorations and appropriates the same as a placer claim, how can the lode claimant who appropriates subsequently consistently pretend that the lode was known to exist before the location of the placer claim? If he or any

other prospector had been familiar with that or the adjacent ground, and had explored in that vicinity, why did not he or they make a valid discovery and location? If they had simply walked over the ground once, or even oftener, occasionally, perhaps using a pick or shovel, disclosing evidence or indications of the existence of a lode, they did not thereby become discoverers in any sense, and they acquired no rights thereby, and if a placer claimant afterwards came along and was of the opinion that the ground was valuable as a placer claim, and located it accordingly, he became the first claimant or appropriator, and if his labors or operations resulted in demonstrating that there existed a lode and that it was of value, was he not in the proper sense the first discoverer? The lode prospector perhaps first formed an opinion that a lode or deposit existed, but it remained for the placer claimant first to demonstrate to the world that it possessed value. In such case who is the discoverer? Who is the benefactor, and who is best entitled to the reward or bounty given to the discoverer?

It is not to be assumed that the law or policy of the Government prefers a lode to a placer claimant. Their rights are distinct and equal before the law. It makes no difference to the Government or the people whether a particular piece of ground containing mineral deposit be owned and mined by a placer owner or lode claimant.

Nor can it be reasonably claimed that the placer claimant who first locates and appropriates a portion of the public domain takes a title subject to some person who may thereafter appear as a lode prospector. In such case the placer claimant was the first comer, the first to take the claim, the first to make the discovery of value, and according to recognized rules of justice and logic, as he was the first in time, he was also the first in right.

The argument so far has been based on the assumption

V.

that the defendant in error, as plaintiff below, was required to establish a perfect title in itself, as to the particular part of the vein in controversy. This assumption was not and is not admitted. The plaintiffs in error never had any title to the ground in controversy. Their intrusion and trespass into the premises of the defendant in error was induced and is now defended upon the theory that the defendant in error acquired no title to the vein by its patent, and that its actual possession unaided by a perfect patented title would not be sufficient to enable it to recover the vein against a person or trespasser wholly without right. The Court below held otherwise, and if it was right in so holding, the judgment must be affirmed. What purports to be a full statement of the evidence is set out in the bill of exceptions, but it is in many parts vague, irrelevant and unintelligible. Had the bill of exceptions stated the several facts clearly and specifically, which the evidence tended to prove, it would have been much more satisfactory. The record sufficiently shows, however, that the plaintiff in error sought to justify, under the Crown Point and Pinnacle lode locations, and it is now assumed in the argument of the plaintiffs in error that they were prior to the entry of the placer claim. Not having taken part in the trial of the case in the Court below, and not being familiar with the evidence otherwise than shown by the record, the writer can only say that the fact is not clearly shown. Aside from that, however, it appears from the testimony of the witnesses, and the plats of the locations of the Crown Point and Pinnacle lodes (to be found between pages 42 and 43 of the record) that the location of the Crown Point lode was laid across and not with the course of the vein and that but a small portion of the length of the vein was included in it. The Pinnacle location is below and contains no part of the apex. The vein in it can be found only by sinking a shaft from the

surface at a greater or less depth through the intervening formation and catching the vein on its dip. At any point in the Pinnacle location where the vein might be so penetrated, the vein if followed to its apex would extend above and beyond the exterior boundary lines on the surface. These facts sufficiently appear from all the evidence in the case, and it is stated and assumed in the instruction given by the court below. The instruction was excepted to, but not for the reason that the assumption was unwarranted or untrue but because as counsel for plaintiffs in error complained, it did not correctly state the law. It may be assumed, therefore, and in fact it has not been denied, that the location of the Crown Point lode, the only one which can be considered in this case, was not made according to the general course or strike of the vein but nearly at right angles to it. The court was, therefore, warranted in saying as it did:

"But here the defendants show no title or right "in the lode at the place in controversy. They assume "the right to follow the lode on its dip out of the "side line of the Pinnacle location and under the Wells "& Moyer placer location, so that it is essential "that they have the dip and apex of the lode "within their location in the general direction of the loca- "tion. A small segment of the dip and apex of the lode "is shown within the Crown Point location, but it extends "not with the length of the location, but across it, so as to "convert the side lines of the claim into end lines and to "limit the direction in which it may be pursued to the space "enclosed by those lines. The place in controversy is not "within the side lines of either of the defendant's locations, "nor within the extension of those lines."

This was exactly in accordance with the law laid down in Mining Company vs. Tarbet, 98 U. S., 463. An attempt is made, however, to evade the effect of the doctrine announced in the case above quoted. A sort of history of mining development in the United States, up to 1872, is given with the design of creating an impression that the Act of 1872, applied to fissure veins only; that "blanket

veins," or veins nearly horizontal, were not then known or heard of, and that it was reserved for the Leadville District, in 1877 and 1878, to present the new phenomenon. The historical accuracy of the sketch may well be questioned, and it is only necessary to refer to the White Pine District, in the State of Nevada, one of whose mines gave rise to the celebrated case of the Eureka Consolidated Mining Company vs. The Richmond Mining Company, reported in 4 Sawyer, 302. The learned Judge in that case found it necessary to define the term vein, as used in the Acts of 1866 and 1872. The vein in that case was not a fissure, nor was it any more vertical than horizontal, but whatever might be its technical name, if one could be found for it, it was held to be a vein within the meaning of the Acts of Congress.

The Court said:

"We are of opinion, therefore, that the term as used "in the Acts of Congress, is applicable to any zone or belt "of mineralized rock lying within boundaries, clearly sepa- "rating it from the neighboring rock. It includes, to use "the language cited by counsel, all deposits of mineral "matter found through a mineralized zone or belt coming "from the same source, impressed with the same formations "and appearing to have been created by the same pro- "cesses."

4 Sawyer, 312.

What difference does it make, therefore, if the vein not being a fissure vein, has a dip of 15, instead of 45 degrees? The difference is in degree only. The law and reason apply as well and with as much force to the one case as to the other. Then it follows that a lode should be discovered on or near the surface, and the location in length thereof should correspond with its general course or strike. As was said in Mining Company vs. Tarbet, *supra*.

"We think that the intent of both statutes is that "mining locations on lodes or veins shall be thereon length-

"wise in the general direction of such lodes or veins on "the surface of the earth where they are *discoverable*."

And in the same case the Court also said:

"We do not mean to say that a vein must necessarily "crop out upon the surface in order that locations may be "properly made upon it. If it lies entirely beneath the "surface and the course of its apex can be ascertained by "sinking shafts at different points, such shafts may be adop- "ted as indicating the position and course of the veins and "locations may be properly made on the surface to it, so as "to secure a right to the vein beneath, but where the vein "itself crops out along the surface or is so slightly covered "by foreign matter that the course of its apex can be ascer- "tained by ordinary surface explorations, we think that the "act of Congress requires that this course should be sub- "stantially followed in laying claims and locations upon it. "Perhaps the law is not so perfect in this regard as it might "be. Perhaps the true course of a vein should correspond "with its strike or the line of the level running through it, "but this can rarely be ascertained until considerable work "has been done and after claims and locations have become "fixed. *The most practical rule is to regard the course of the "vein as that which is indicated by surface outcrop or surface "explorations and workings. It is on this line that claims "will naturally be laid whatever be the character of the surface "whether level or incline.*"

If the course clearly indicated by the decision above quoted had been followed by the grantors of the plaintiffs in error and their discovery was before the entry of the placer patent as assumed, they could easily have made their location so as to correspond with the course or strike of the vein, and in that case it would not be necessary to argue against the supposititious cases presented by the counsel for the plaintiffs in error. The evidence clearly shows that all the workings in either of the locations or in the placer claim were all upon the same vein or lode. It was not the intention of Congress that different locations should be made upon the same sections of the vein lengthwise. If the vein had been properly discovered and located by any lode claimant on the surface, there would be no locator above to raise the one question and no

locator below to raise the other, as suggested by the learned counsel for the plaintiffs in error. The evidence shows that the vein in question had an outcrop or apex near the surface, and this outcrop could doubtless have been ascertained by reasonable exploration, and the sinking of shafts on the surface as indicated in the Tarbet case. If one locator failed to develop the course of the lode on or near the surface for the entire distance of 1500 feet, he could, nevertheless, make his location along the length of the lode according to his developments and would thereby certainly secure so much of the vein in length and the right to follow it according to its dip between his end lines. A subsequent and more fortunate or persevering prospector might find the outcrop or apex beyond him and another, and another, indefinitely until the lode was discovered, located and appropriated to its entire length. In such case each locator would abut by his end lines on his neighbor, and all in peace and harmony could continue in sinking and working upon the vein according to its dip, though it might enter the land adjoining, whether placer claim or lode claim. But as before stated, the only location which includes any part, and that a small part, of the apex or outcrop of the lode is the Crown Point, and drawing a line at right angles where each end departs from the lines of the location and thus forming end lines, the owners may pursue that without let or hindrance so far as the defendant in error is concerned. Because in that case, according to the testimony of some of the witnesses, they would not approach within several hundred feet of the workings and premises of the defendant in error. This argument might be extended by answering various questions and suppositions presented by the learned counsel for the plaintiffs in error, but a discussion of them would not lead to the solution of the particular question and the only question really presented by the record in this case.

"wise in the general direction of such lodes or veins on "the surface of the earth where they are *discoverable*."

And in the same case the Court also said:

"We do not mean to say that a vein must necessarily "crop out upon the surface in order that locations may be "properly made upon it. If it lies entirely beneath the "surface and the course of its apex can be ascertained by "sinking shafts at different points, such shafts may be adop- "ted as indicating the position and course of the veins and "locations may be properly made on the surface to it, so as "to secure a right to the vein beneath, but where the vein "itself crops out along the surface or is so slightly covered "by foreign matter that the course of its apex can be ascer- "tained by ordinary surface explorations, we think that the "act of Congress requires that this course should be sub- "stantially followed in laying claims and locations upon it. "Perhaps the law is not so perfect in this regard as it might "be. Perhaps the true course of a vein should correspond "with its strike or the line of the level running through it, "but this can rarely be ascertained until considerable work "has been done and after claims and locations have become "fixed. *The most practical rule is to regard the course of the "vein as that which is indicated by surface outcrop or surface "explorations and workings. It is on this line that claims "will naturally be laid whatever be the character of the surface "whether level or incline.*"

If the course clearly indicated by the decision above quoted had been followed by the grantors of the plaintiffs in error and their discovery was before the entry of the placer patent as assumed, they could easily have made their location so as to correspond with the course or strike of the vein, and in that case it would not be necessary to argue against the supposititious cases presented by the counsel for the plaintiffs in error. The evidence clearly shows that all the workings in either of the locations or in the placer claim were all upon the same vein or lode. It was not the intention of Congress that different locations should be made upon the same sections of the vein lengthwise. If the vein had been properly discovered and located by any lode claimant on the surface, there would be no locator above to raise the one question and no

locator below to raise the other, as suggested by the learned counsel for the plaintiffs in error. The evidence shows that the vein in question had an outcrop or apex near the surface, and this outcrop could doubtless have been ascertained by reasonable exploration, and the sinking of shafts on the surface as indicated in the Tarbet case. If one locator failed to develop the course of the lode on or near the surface for the entire distance of 1500 feet, he could, nevertheless, make his location along the length of the lode according to his developments and would thereby certainly secure so much of the vein in length and the right to follow it according to its dip between his end lines. A subsequent and more fortunate or persevering prospector might find the outcrop or apex beyond him and another, and another, indefinitely until the lode was discovered, located and appropriated to its entire length. In such case each locator would abut by his end lines on his neighbor, and all in peace and harmony could continue in sinking and working upon the vein according to its dip, though it might enter the land adjoining, whether placer claim or lode claim. But as before stated, the only location which includes any part, and that a small part, of the apex or outcrop of the lode is the Crown Point, and drawing a line at right angles where each end departs from the lines of the location and thus forming end lines, the owners may pursue that without let or hindrance so far as the defendant in error is concerned. Because in that case, according to the testimony of some of the witnesses, they would not approach within several hundred feet of the workings and premises of the defendant in error. This argument might be extended by answering various questions and suppositions presented by the learned counsel for the plaintiffs in error, but a discussion of them would not lead to the solution of the particular question and the only question really presented by the record in this case.

VI.

In an additional brief filed by one of the counsel for the plaintiffs in error (Mr. Morrison) a distinction between this and the Tarbet case is attempted to be made and it is embellished by a couple of diagrams prepared by counsel to suit his effort. If his theory were to prevail, there would never be any certainty as to the end lines, and still less as they should be projected on or under the surface. Disputes between adjoining owners would be constant and endless. Mining experts, witnesses and surveyors would be constantly differing as to the strike and dip of the vein at the place in controversy. Continuing developments would show deflections and tortuosities of the vein which would furnish a basis and pretext for fresh disputes. Congress never intended to permit such uncertainty and confusion, and the statutes fairly construed will not warrant that pretension. The exterior lines mentioned in the statutes are geometrical lines, defined by actual survey, and can be easily extended indefinitely with mathematical certainty. Instead, therefore, of a line drawn at an uncertain and variable angle, the line should be drawn at right angles from the side line of the location at the point where the vein departs from and goes beyond the side lines. That is the clear and unmistakable effect of the decision in Mining Company vs. Tarbet. The new proposition or distinction, so called, urged by the counsel for the plaintiffs in error would not only be a departure but an overthrow of the law as declared and stated in the case referred to, and would reopen what has heretofore been regarded as settled.

VII.

In both the briefs filed by counsel for the plaintiffs in error, repeated allusion is made to the alleged fact that only a small portion of the area covered by the Wells and Moyer placer is placer ground, and that the grantors of the defendant in error perpetrated a fraud on the Government and its citizens in their application and entry. Some

evidence tending to prove that all of the ground was not placer ground, and that the application for the placer patent was really made for the purpose of obtaining title to the lode or vein claimed to exist in it was permitted.

Claiming as the defendant in error did that the evidence was irrelevant, and incompetent, it made no effort to dispute or contradict that pretense. It relied upon its patent and it relied upon the decisions of this Court to the effect that in an action at law the patent was conclusive. Encouraged, however, by the license permitted in the introduction of evidence, the counsel now indulge in statements, suppositions and insinuations, designed to show that the defendant in error is a grasping monopoly, and argue that a latitudinarian construction in favor of all outsiders should be adopted. If what they so freely and frequently hint at be true, there is an amply remedy, and one which has existed at all times since the alleged acts became known; to borrow a favorite phrase in this case, if a fraud "be known to exist" it can easily be discovered and appropriated for use in a direct proceeding, for the purpose of having the patent cancelled and set aside.

But in view of the fact that this Court has so frequently affirmed that a patent is the highest form of a conveyance, is fortified by all presumptions and is absolutely conclusive in an action at law, it is proper for me to quote that "it creates an unpleasant surprise to find that counsel "in discussing the effect to be given to the action of that "department (Interior Department) overlook our decisions "on that subject." 106 U. S., 450.

As to everything of that kind said by counsel, and as to the effect and construction given to the patent under which we claim, I refer to

Smelting Company vs. Kemp, 104 U. S., 636, and
Steel vs. Smelting Company, 106 U. S., 447.

Respectfully submitted,

HUGH BUTLER,
Attorney for Defendaut in Error.